

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ASTRAZENECA LP and ASTRAZENECA
AB,

Plaintiffs,

vs.

CIVIL ACTION
NO. 09-4115 (RMB/AMD)

BREATH LIMITED,

Defendant.

ASTRAZENECA LP and ASTRAZENECA
AB,

Plaintiffs,

vs.

CIVIL ACTION
NO. 08-1512 (RMB/AMD)

APOTEX, INC. And APOTEX CORP.,

Defendant.

ASTRAZENECA LP and ASTRAZENECA
AB,

Plaintiffs,

vs.

CIVIL ACTION
NO. 10-5785 (RMB/AMD)

SANDOZ, INC.,

Defendant.

UNITED STATES COURTHOUSE
ONE JOHN F. GERRY PLAZA
4TH AND COOPER STREETS
CAMDEN, NEW JERSEY 08101
(856) 968-4986
MONDAY, MAY 23, 2011

B E F O R E:

ANN MARIE DONIO,
UNITED STATES MAGISTRATE JUDGE

LISA MARCUS
CERTIFICATE # 1492
OFFICIAL U. S. REPORTER

A P P E A R A N C E S:

McCARTER & ENGLISH
BY: JOHN E. FLAHERTY, ESQUIRE
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(973) 622-4444
ATTORNEYS FOR PLAINTIFF

ROPES & GRAY
BY: DENISE L. LORING, ESQUIRE
PABLO D. HENDLER, ESQUIRE
1211 Avenue of the Americas
New York, New York 10036
(212) 596-9000
ATTORNEYS FOR PLAINTIFF

HILL & WALLACK
BY: CHRISTINA LYNN SAVERIANO, ESQUIRE
202 Carnegie Center
Princeton, New Jersey 08543
(609) 734-6395
ATTORNEYS FOR DEFENDANT APOTEX

ST. ONGE, STEWARD, JOHNSTON & REENS
BY: DAVID ALDRICH, ESQUIRE
986 Bedford Street
Stamford, Connecticut 06905-5619
(203) 324-6155
ATTORNEYS FOR DEFENDANT APOTEX

DUANE MORRIS
BY: SHEILA RAFTERY WIGGINS, ESQUIRE
744 Broad Street, Suite 1200
Newark, New Jersey 07102
(973) 424-2000
ATTORNEYS FOR DEFENDANT SANDOZ

BRINKS, HOFER, GILSON & LIONE
BY: ROBERT G. PLUTA, ESQUIRE
NBC Tower, Suite 3600
455 North Cityfront Plaza Drive
Chicago, IL 60611-5599
312.321.4200
ATTORNEYS FOR DEFENDANT SANDOZ

A P P E A R A N C E S: (CONTINUED)

SAIBER, LLC
BY: KATHERINE ESCANLAR, ESQUIRE
One Gateway Center, 10th Floor
Newark, New Jersey 07102-5311
(973) 622-3333
ATTORNEYS FOR DEFENDANT BREATH LIMITED

RAKOCZY, MOLINO, MAZZOCHI & SIWIK
BY: HEINZ J. SALMEN, ESQUIRE
6 West Hubbard Street, Suite 500
Chicago, Illinois 60610
(312) 222-6301
ATTORNEYS FOR DEFENDANT BREATH LIMITED

1 DEPUTY CLERK: All rise.

2 THE COURT: Please be seated.

3 Good afternoon, everyone. We're here for argument in
4 connection with a motion for reconsideration filed in case
5 number 08-1512. May I have the appearances for the record,
6 please.

7 MR. FLAHERTY: Good afternoon, your Honor. My name
8 is John Flaherty from McCarter & English, I'm here for the
9 plaintiffs AstraZeneca. With me today is Judy Yun from
10 AstraZeneca, and Denise Loring from Ropes & Gray, Pablo
11 Hendler also from Ropes & Gray. We have a summer associate
12 from Ropes & Gray with us, Adam Steinmetz.

13 THE COURT: All right. Thank you. Welcome.

14 MS. LORING: Good afternoon.

15 THE COURT: Good afternoon.

16 And for defendants, starting with Apotex.

17 MS. SAVERIANO: Christina Saveriano from Hill &
18 Wallack, your Honor, for defendant Apotex. Along with me is
19 David Aldrich from St. Onge, Steward, Johnston & Reens.

20 THE COURT: Thank you.

21 MR. ALDRICH: Good afternoon, your Honor.

22 THE COURT: Good afternoon.

23 Defendant Sandoz.

24 MS. WIGGINS: Good afternoon. I'm Sheila Wiggins
25 from Duane Morris, and with me is Robert Pluta.

1 MR. PLUTA: Good afternoon, your Honor.

2 THE COURT: Good afternoon.

3 And for Breath Limited.

4 MS. ESCANLAR: Good afternoon, your Honor. I'm
5 Katherine Escanlar, Saiber, LLC, for defendant Breath. And
6 along with me is our co-counsel Heinz Salmen from Rakoczy,
7 Molino, Mazzochi & Siwik from Chicago.

8 MR. SALMEN: Good afternoon, your Honor.

9 THE COURT: Good afternoon.

10 Are we ready to proceed with the argument?

11 MS. LORING: Yes, your Honor.

12 THE COURT: Who will be arguing on behalf of
13 AstraZeneca?

14 MS. LORING: Yes, your Honor, Denise Loring.

15 THE COURT: All right. Ms. Loring, I reviewed your
16 submissions and I'll hear your argument now.

17 MS. LORING: Thank you, your Honor.

18 Your Honor, we respectfully request reconsideration on
19 your Honor's Order on three basic grounds.

20 The first is we respectfully submit that the Court
21 overlooked key factual and legal issues in deciding that
22 priority application to U.S. patents do not touch base with
23 the United States because the U.S. interest is incidental as
24 opposed to substantial.

25 Our second point is that respectfully that the Court

1 overlooked key facts and legal issues in finding that
2 AstraZeneca had not met its burden of proof in proving injury
3 under Swedish trade secret law.

4 And then the third point is that in applying the
5 balancing test of the restatement, which weighs the interest
6 of the United States versus the interest of Sweden, the Court
7 overlooked fact and law regarding the very strong United
8 States interest in protecting attorney advice and did not give
9 adequate credence to the Swedish law in protecting trade
10 secrets.

11 And so if your Honor would like to hear, I'm prepared
12 to go through all three of those points.

13 THE COURT: All right. I'll hear your argument.

14 MS. LORING: With respect to the first point, whether
15 or not patent applications, priority applications to U.S.
16 applications touch base with the United States, we submit that
17 the United States does indeed have a predominant interest in
18 those applications for the following reasons.

19 First of all, it is a very fact specific inquiry. And,
20 in this case, as we pointed out in our papers, the work that
21 led to the invention of the '834 patent was as part of the
22 development of AstraZeneca's product Budesonide in the United
23 States. The invention came about because --

24 THE COURT: I'm going to cough all through these
25 proceedings. Keep going.

1 MS. LORING: Would you like some water, your Honor?

2 THE COURT: No, thank you.

3 MS. LORING: The invention came about because of the
4 U.S. FDA requirement that the Budesonide in the United States
5 be sterile. Budesonide had been sold outside the United
6 States in nonsterile form. And in making that invention,
7 researchers in Sweden and in the United States came up with
8 methods and sterile products. And Cheryl L'arrivee-Elkin, who
9 is a U.S. citizen, lives in Massachusetts, is an inventor on
10 the '834 patent and was intimately involved in developing the
11 product and in its reduction to practice, reducing the
12 practice of the '834 invention and also provided, if you look
13 at the withheld log, provided input into the preparation of
14 the application. There are many documents on the withheld log
15 that relate to Ms. Elkins giving input to the European patent
16 agents who were preparing the applications.

17 The other point, your Honor, is there is a distinction
18 in the case law or the case law that your Honor cited and that
19 Apotex cited often talks about prosecution of foreign
20 applications being strictly governed by foreign law. However,
21 there is a difference between prosecution of an application
22 once it is filed and preparation of that application. When
23 you prepare a priority application, especially when you know,
24 as AstraZeneca did in this case, that they would be filing
25 that application in the United States, at the time the

1 application is prepared, you must think about U.S. law and
2 meeting the U.S. requirements for valid patents. In fact,
3 when you designate the United States in a PCT application,
4 that designation is made at the time that the PCT application
5 is filed. And so Apotex's argument, which your Honor adopted,
6 that the filing of a U.S. application occurred later is true
7 chronologically, but when the application was prepared, the
8 lawyers and the inventors and other personnel who were seeking
9 legal advice very much had in mind the U.S. -- the fact that
10 this would be filed in the United States.

11 And that's distinguishable from the discussions in
12 cases like *VLT Corp.* and *Golden Trade* where they talk about
13 prosecution in foreign countries. Because at that point in
14 time, of course, the focus is then on the foreign law because
15 you're arguing with the patent offices in the foreign
16 countries about patentability under foreign law. Very
17 different circumstance from actually preparing the patent
18 application.

19 Your Honor, we submit that our situation is very close
20 to the situation in *Odone* because again in that case the U.S.
21 interest as articulated by the court, was the involvement of
22 U.S. citizens. In that case it was whether or not a U.S.
23 citizen would be named as an inventor on a UK application. In
24 this case, it's the fact that a U.S. citizen was involved in
25 the making of the invention and the preparation of the patent

1 applications that led -- that were the priority applications
2 for the U.S. application.

3 The other thing about the *Odone* case, your Honor, that
4 we would respectfully submit the Court overlooked, is that the
5 issues of comity there cut against applying foreign law and in
6 favor of applying U.S. law because there was a conflict
7 between the privilege law in the United States and the
8 privilege law of the UK. In the UK, British patent agents
9 were entitled to privilege. The way the *Odone* court read the
10 law, those British patent agents would not be protected in the
11 United States. And so the court felt that, in balancing those
12 interests, the U.S. interest in free discovery dominated the
13 British interest in patent agent privilege.

14 In our case the reverse is true, your Honor. And in
15 fact the U.S. interest in protecting privilege is aligned with
16 the Swedish interest in protecting its trade secrets. In
17 fact, several courts have recognized that alignment even when
18 applying foreign law. In the *Astra* case, the court found, in
19 considering the Korean documents at issue there, which the
20 court did under Korean law, the court found that the U.S.
21 interest in protecting privileged communications outweighed
22 the U.S. interest in free discovery in that case.

23 Also, in the *Golden Trade* case that Apotex cited and I
24 believe your Honor cited, the court found that the interest,
25 applying, again, foreign law, the interest in protecting

1 patent agent privilege was consistent with the U.S. interest
2 of protecting attorney advice. Same thing with the *VLT Corp.*
3 Decision. And so the *Odone* court is -- the *Odone* decision is
4 directly on point with respect to the situation that we have
5 before your Honor.

6 Similarly, the *Astra* decision is supportive of not
7 compelling production. And, your Honor, we would like to
8 raise the letter that we sent to you last week in which we
9 were able to locate two of the documents that had been at
10 issue in that case. And as we showed from the privilege log
11 and the declaration of an *Astra* individual, those documents
12 were indeed relating to a Swedish PCT application and foreign
13 counterparts to a U.S. patent and did not relate directly to
14 the U.S. patent and did not involve U.S. lawyers, and the
15 judge in that case found that they touched base with the
16 United States. And we believe, your Honor, that that supports
17 our reading of the case and bring it to your Honor's attention
18 to clarify the situation.

19 THE COURT: You would agree that the Court's not
20 bound by *Odone* or the *Astra* case?

21 MS. LORING: Absolutely, your Honor. But in this
22 situation where we were unable to find any case in this
23 district that directly addresses this issue, we believe, and
24 in fact courts in New Jersey have supported looking to the
25 decisions of other districts. I'll raise for your Honor

1 *United States vs. Sensient Colors*, at 649 F. Supp. 2d 309, in
2 which -- excuse me, your Honor. Judge Rodriguez in this court
3 acknowledged that it would be appropriate to and not improper
4 for the magistrate judge in this case to have relied on
5 persuasive authority from other districts when there was
6 nothing directly on point in this district.

7 THE COURT: But you would agree the Court's not bound
8 by either of those decisions.

9 MS. LORING: I beg your pardon.

10 THE COURT: You would agree the Court is not bound by
11 either of those decisions.

12 MS. LORING: No, your Honor, the Court is not bound.
13 Nor is the Court bound by any of six decisions that Apotex
14 pointed to because none of those is in New Jersey either.

15 THE COURT: So how would you address Apotex's
16 argument that you can't meet the standard for reconsideration
17 by arguing that the Court erred in applying law that the
18 Court's not bound to apply? I think that's one of the
19 arguments of Apotex.

20 MS. LORING: Well, your Honor, our argument is more
21 that the Court overlooked the factual and legal situations in
22 those cases and distinguished those cases in ways, based on
23 Apotex's submissions, in ways that we submit were erroneous.
24 And, therefore, we believe it's a proper basis for
25 reconsideration to point out to your Honor the new information

1 in the case of Astra, and also the fact that your Honor's
2 distinguishing of Odone is actually -- we are actually aligned
3 with Odone rather than different from it as your Honor held in
4 your decision.

5 THE COURT: Okay. You can continue.

6 MS. LORING: In terms of the six cases that Apotex
7 cites for the proposition that this happens all the time, that
8 district courts or that courts do not consider a foreign
9 priority application as touching base with the United States,
10 we think again that your Honor overlooked a number of points
11 with respect to those cases.

12 First of all, none of those cases considered whether or
13 not -- I'm sorry. None of those cases disclosed whether or
14 not any of the withheld documents at issue were in fact draft
15 foreign priority applications or PCT priority applications.
16 And, in fact, when you look at the *Golden Trade* case, which
17 Apotex cited to your Honor, by Apotex's own admission the
18 priority application in that case was an Italian application
19 and the court dealt with documents that were withheld under
20 Norwegian, German and Israeli law, there was no discussion
21 whatsoever of Italian law or Italian priority applications.
22 And so that case clearly does not relate to foreign priority
23 applications, and it points out the problem with relying on
24 these cases that did not conduct an analysis of whether or not
25 foreign priority applications or PCT applications touched base

1 with the United States. Indeed, the *SKB v. Apotex* case
2 acknowledged that some courts provide or perform a touching
3 base analysis but that court itself declined to do so. And
4 *Eisai v. Dr. Reddy's* also did not conduct a touching base
5 analysis.

6 And so, your Honor, we submit that cases like the *Astra*
7 case and the *Odone* case, because they specifically addressed
8 the question of privilege in the context of foreign priority
9 applications and found that they touched base with the United
10 States are far more persuasive than the six cases that Apotex
11 cited.

12 Your Honor, I'm ready to move on to Swedish trade
13 secret law unless you have further questions on the touching
14 base.

15 THE COURT: I only have the specific question are you
16 no longer asserting that a PCT application is a U.S.
17 application?

18 MS. LORING: Well, your Honor, we believe it is.

19 THE COURT: Do you have any authority for that
20 statement?

21 MS. LORING: Your Honor, I have no case law that
22 holds that it is. But I think -- and I guess the most
23 persuasive argument that I can make is the way that the PCT
24 application is described on the face of the '834 patent as
25 they relate to a U.S. application. However, I think that --

1 THE COURT: How about the treaty itself? Is there
2 any language that suggests that making an application in a
3 receiving office pursuant to the PCT makes the application a
4 U.S. application?

5 MS. LORING: I think, your Honor, the more important
6 point -- and I do not, your Honor.

7 THE COURT: Okay.

8 MS. LORING: I think the more important point is not
9 the categorizing of PCT as a U.S. application or not a U.S.
10 application, I think the more important point is the timing
11 issue of the relevance of a PCT application to the United
12 States when the U.S. is a designated company. And that
13 relevance is clear when you consider the fact that at the time
14 that the application was filed, and I mentioned this a moment
15 ago, at the time the application is filed the U.S. is
16 designated. And so clearly when the application is filed, not
17 at some later date when the application is activated in the
18 U.S., but at the time of filing there's a clear indication
19 that U.S. law will need to be complied with because the U.S.
20 is designated. And James Peel in his declaration stated that
21 at the time he prepared to PCT application and the Swedish
22 foreign priority application, he knew these applications would
23 be filed in the United States. And under the specific facts
24 in our case, the invention being at least partially made in
25 this country along with Swedish inventors, and the fact of the

1 U.S. citizen communicating back and forth with Mr. Peel and
2 with her fellow inventors very much involved the United States
3 and made the United States the predominant interest. This was
4 a drug that was being developed for the U.S. market. The
5 other countries where Budesonide was on the market did not
6 require a sterile product. The invention sprung out of U.S.
7 requirement for a sterile product.

8 THE COURT: Well, you have in your brief a statement,
9 "there can be no dispute that under Section 363, AZ's PCT
10 application is a U.S. application." That's quoting Page 4 of
11 the motion.

12 MS. LORING: Yes, your Honor. And we --

13 THE COURT: And Apotex, of course, says there's a
14 dispute because Apotex says in their opposition "that PCT
15 application is most certainly not a U.S. application." Page 9
16 of the opposition brief.

17 So my specific question is, putting aside any effect of
18 the timing, is it Astrazeneca's position that the filing of
19 the PCT application and the designation, if that in fact is
20 what is designated on the PCT application, the United States,
21 constitutes a U.S. application as opposed to an international
22 application filed under the PCT?

23 MS. LORING: Well, it certainly is an international
24 application filed under the PCT, your Honor. But the way we
25 read 35, U.S.C., Section 363, which says an international

1 application designating the United States shall have the
2 effect from its international filing date under Article 11 of
3 the PCT of a national application for patent regularly filed
4 in the United States Patent and Trademark Office. So what
5 Section 363 is saying when you file, as of the filing date of
6 the PCT application, it has the effect of a U.S. application,
7 and that's what we mean when we say it is a U.S. application.
8 And that is borne out by the fact that the '834 patent on its
9 face identifies the PCT as a related U.S. application. It
10 doesn't say foreign priority. If you look, if I can find a
11 copy of the, and I will, of the '834 patent -- bear with me
12 one moment, your Honor. There are two categories, foreign
13 application priority data, which is number 30 on the face of
14 the patent, and it identifies there the Swedish application,
15 and then number 63 on the face of the patent just above that
16 there's a heading related to U.S. application data and it
17 cites the PCT application. And so the PCT application is
18 distinguished from the Swedish application on the face of the
19 '834 patent as a related U.S. application as compared to a
20 foreign application, i.e., the Swedish application. And that
21 is the basis for our statement, your Honor.

22 THE COURT: All right. Do you have any dispute with
23 Astrazeneca's argument that the PCT application was actually
24 filed, was not filed in the United States, the receiving
25 office was Sweden?

1 MS. LORING: It was filed in the receiving office for
2 Sweden. And the way you tell that, your Honor, is the PCT
3 number, it's PCT/SE, which indicates the receiving office.

4 THE COURT: So you don't dispute that?

5 MS. LORING: No dispute.

6 THE COURT: Okay. Anything further? Any further
7 argument you have on the motion? Go ahead. Continue.

8 MS. LORING: On the Swedish?

9 THE COURT: On any point you wish the Court to
10 consider.

11 MS. LORING: Thank you, your Honor.

12 In terms of the application of the Swedish trade secret
13 law, your Honor found that the documents at issue did not
14 touch base with the United States so then turned to
15 application of Swedish law, and your Honor then applied the
16 Swedish law and analyzed the requirements for Swedish law.
17 But at the same time your Honor applied a burden of proof
18 pursuant to Rule 26(c) of showing serious harm in order to
19 prove that these documents are trade secrets of AstraZeneca.

20 And, your Honor, we respectfully submit that that was
21 the wrong standard to apply because it basically substituted
22 the burden of proof applied in Swedish courts for a higher
23 standard applied under Rule 26(c). If your Honor were to
24 conduct an analysis under Swedish law, then the Swedish burden
25 ought to apply. And there is no dispute from Apotex that that

1 standard is that typically these types of documents would
2 cause harm. And so we submit that the standard was not the
3 correct standard.

4 But moving on from there, even assuming that the higher
5 standard applied, we respectfully submit that the Court
6 overlooked certain evidence and facts that indicate that
7 AstraZeneca did indeed meet its burden. The Order states that
8 your Honor found that we did not meet the burden, but the
9 Court did not conduct any analysis of the factual submissions
10 that AstraZeneca made and legal submissions, including the
11 declaration of Dr. Sande, the Swedish advocate, who pointed
12 out that the subject matter of these communications, which is
13 legal advice, attorney advice and analysis, is considered
14 extraordinarily confidential and in fact more important than
15 technical trade secret information, and for that reason a
16 protective order would not be sufficient to protect
17 AstraZeneca's injuries.

18 In fact, as Apotex has argued to your Honor in the
19 context of AstraZeneca's motion to compel, attorney advice and
20 attorney/client privilege is sacred and compellingly
21 important. This was recognized by other courts, your Honor,
22 as I pointed out before, the Astra court, the *Golden Trade*
23 court, and the *VLT Corp.* court.

24 In addition, although your Honor recited the need for
25 Apotex to show a compelling reason to require production under

1 Swedish law for these documents, Apotex did not provide a
2 compelling reason and your Honor did not identify any
3 compelling reason. And so we submit that we did in fact show
4 that these documents constitute trade secrets, that we would
5 be injured by their disclosure because of the compelling
6 interests in frank discourse between a client and his or her
7 lawyer, which would result in significant serious harm if
8 those confidences were breached and the documents were
9 compelled to be disclosed.

10 THE COURT: Thank you. Anything further?

11 MS. LORING: Yes.

12 THE COURT: Okay.

13 MS. LORING: The balancing under the restatement,
14 your Honor. We respectfully submit that the Court overlooked
15 the compelling interest of the United States in protecting
16 attorney/client privilege. And again, I refer to Page 102 of
17 the Astra decision where the court there in applying Korean
18 law found that the U.S. interest in protecting privilege
19 outweighed the interest of free discovery.

20 Also, the court downplayed the Swedish interest in
21 protecting trade secrets by referring to the fact that the
22 Swedish trade secret law does not absolutely ban production of
23 trade secrets. But this overlooked the fact that, as
24 Dr. Sande said, the court has never compelled production of
25 trade secret information, as far as he was aware, for

1 compelling reason. And so although there is no absolute ban
2 under Swedish law, the Swedish courts clearly take that --
3 have a very strong interest because they have never permitted
4 disclosure of trade secrets.

5 And, your Honor, we submit you have to look at the
6 Swedish law in total. Apotex referred in its reply brief to a
7 Swedish policy of not protecting attorney/client privilege
8 with in-house lawyers. We submit that's the wrong analysis,
9 because although there isn't a specific privilege,
10 attorney/client privilege for in-house lawyers, there is trade
11 secret protection. And you cannot, as the *Astra* court said,
12 look at the privilege law in a vacuum, you have to look at
13 whether in Sweden these documents would see the light of day.
14 And they wouldn't. They wouldn't in Sweden and they wouldn't
15 in the United States. There's no real dispute that if these
16 documents touched base with the U.S., if they involved a U.S.
17 application, they'd be protected.

18 So we submit you need to look at the nature of the
19 communication, the fact that regardless of whether or not the
20 documents touch base with the United States, they are and
21 relate to attorney advice and that's a compelling -- there is
22 a compelling U.S. interest in protecting that.

23 THE COURT: Anything further?

24 MS. LORING: Nothing further, your Honor.

25 THE COURT: All right. Who will do the argument for

1 Apotex?

2 MR. ALDRICH: David Aldrich, your Honor.

3 THE COURT: Mr. Aldrich, I'll hear your argument now.

4 MR. ALDRICH: Your Honor, first, if it's okay, I'd
5 like to first quickly address the last minute filing of
6 AstraZeneca.

7 THE COURT: Yes. Your position with respect to the
8 filing?

9 MR. ALDRICH: I object to it for various reasons.
10 The first reason is that we believe it's improper for them to
11 be making this submission this late. Not only is all the
12 briefing -- was all the briefing complete, but this is a
13 motion for reconsideration, and all the briefing on the motion
14 for reconsideration was complete. And these are documents
15 that are within their own custody. And it's, you know, the
16 rule -- it's a motion for reconsideration and the rules
17 explicitly don't allow reply briefs without court approval.
18 So they've submitted this letter, it's an unauthorized reply
19 brief and it's very late in the game to be doing it after
20 motion for consideration briefing is complete submitting their
21 own documents a couple of days before this hearing.

22 It's also improper because, again, this was a motion
23 for reconsideration, so it's not even relevant because, as
24 your Honor already addressed a few minutes ago, these
25 documents go to the supposedly correct interpretation of one

1 case from another district, which is not a proper basis for
2 filing a motion for reconsideration. The Court is not bound
3 by that law regardless of what it says, so it's not an -- the
4 Court did not commit an error of law whether it followed that
5 case or not, it's not proper for a motion for reconsideration.

6 Third, even if we look at it substantively, it doesn't
7 show anything. What they've submitted is a couple of -- they
8 submitted a couple entries on a privilege log, which are very
9 vague and it says the documents go towards -- those documents
10 relate to, I forget the exact language, but I think it says
11 PCT for foreign counterparts or something similar to that.
12 That's very vague and none of us have any idea what those
13 documents actually say. I would certainly want to see those
14 documents before anybody tried to rely on them, to use them as
15 an indication that this case from New York means something
16 different than what it says on its face. You know, I take --
17 we take issue, obviously, with some of the representations
18 that AstraZeneca has made about what PCT's are and their
19 relationship to U.S. filings. So I would certainly want to
20 see specifics if those documents were even going to be
21 considered.

22 And, you know, finally, at the end of the day, even if
23 those documents did conflict with what that case decision says
24 and those documents do say or that -- I mean, AstraZeneca
25 hasn't actually said this, I don't think, but they're implying

1 that the documents only relate to PCT applications. And, if
2 that's the case, that still doesn't prove anything. All that
3 does is, you know, with all due respect to the, I think it was
4 the Southern District of New York, all that does is show that
5 the Southern District of New York misread those two documents
6 because that's not what the Southern District of New York's
7 decision said. The Southern District of New York's decision,
8 when it said certain documents could be maintained on the
9 basis of attorney/client privilege, was that those documents
10 either were with U.S. counsel or they related to a U.S.
11 application.

12 So, at the end of the day, even if the submission was
13 proper and, you know, we did look at the documents, we did
14 consider them, and they do say what AstraZeneca suggests,
15 doesn't prove anything at the end of the day anyway. You
16 know, that case law says what it says on its face.

17 Unless your Honor would like to discuss that submission
18 anymore, I'll move on to the substantive topics.

19 THE COURT: You can move on.

20 MR. ALDRICH: Okay. Thank you, your Honor.

21 The first issue that Mrs. Loring was just addressing
22 were the PCT filings. And Mrs. Loring made two arguments.
23 The first was that she mentioned it was fact specific and was
24 analyzing about the development of the product that gave rise
25 to this, to that patent application.

1 This case is not about AstraZeneca's product, it's
2 about their patents or their patent, U.S. patent and Apotex's
3 product that allegedly infringes that patent. So where
4 research relating to their product may have taken place is not
5 relevant to our analysis of these documents. These documents
6 supposedly relate to filings and prosecution of their patents.
7 That PCT application -- and, incidentally, we don't seem to be
8 arguing -- I don't want it to get lost that, you know, we
9 don't seem to be arguing anymore about the communications
10 about the foreign Swedish document, I believe they've
11 capitulated on that at this point.

12 MS. LORING: No, your Honor.

13 MR. ALDRICH: Okay. Okay. I don't know what their
14 arguments are then for the foreign application.

15 But for the PCT application itself, we're talking about
16 filing and, quote, unquote, prosecution of the PCT
17 applications, to the extent there is any, there isn't much of
18 one. But that, you know, that application was filed in
19 Sweden. Swedish patent office was designated as the
20 international search authority. You know, when you file a PCT
21 application, there's a prior art search is done. That was
22 done by the Swedish patent office. I don't know -- I don't
23 know if any of the parties submitted, we didn't get into this
24 much detail, I don't know if either party submitted a PCT
25 application, but I do have a copy of it if your Honor wants to

1 look at it. And you can see all this from the application, it
2 was filed in Swedish, the research authority was the Swedish
3 patent office, everything that took place with respect to that
4 application took place in Sweden.

5 And Mrs. Loring also made a distinction between
6 preparation and the prosecution of that application. And the
7 preparation -- I'm sorry if I'm not paraphrasing for the Court
8 completely accurately, but my understanding of the argument is
9 that the preparation -- when that preparation was done, it was
10 taken into account all the different countries and it
11 designated the U.S.

12 The PCT application is an international filing. It
13 designates many countries. It's 120 something. It designates
14 all the countries basically. And, you know, if we're going
15 to -- if we're going to say, well, when somebody was thinking
16 about preparing the Swedish priority application or this PCT
17 application that was filed in Sweden, that they were also
18 thinking of the U.S., they also then were designated and
19 thinking of 120 other some odd countries. And whose law do we
20 apply then at that point? You know, that's the fallacy of
21 this argument, that a PCT is a U.S. application. It's not,
22 it's its own independent. If you're going to call it a U.S.
23 application, you need to also call it a Japanese application,
24 a Swedish application, a German application.

25 THE COURT: Tell me why, why you make that argument?

1 Why, if the U.S. is designated on the PCT application, are you
2 saying other countries are also designated?

3 MR. ALDRICH: Yes, I think it's like 122 other
4 countries.

5 THE COURT: On that same PCT application.

6 MR. ALDRICH: On the same PCT application. It's
7 standard procedure, you designate basically all the countries
8 that you can.

9 THE COURT: That's all under the PCT?

10 MR. ALDRICH: That's all under the PCT. Under the
11 PCT laws, correct. The PCT -- maybe this bears a little more
12 explanation.

13 The PCT is a completely separate filing that is filed
14 in a receiving office, in this case the Swedish receiving
15 office. Now, if you want to then enter national stage in a
16 particular country, the U.S., Japan, wherever, if you wanted
17 to start prosecution of an application in the U.S., it is
18 completely a new filing. There are actually two different
19 ways you can do it, but one is called a bypass continuation
20 where you file a continuation application off of the PCT, the
21 other is called entering national stage from the PCT. But,
22 for all intents and purposes -- there's certain strategic
23 reasons why you might prefer to do one over the other. But,
24 for all intents and purposes, they're very similar, they're
25 both separate filings. When you're entering national stage

1 off a PCT, it's a new filing where you, you know, you submit a
2 copy of the PCT application, a new PCT form, new paperwork,
3 you file a declaration, new power of attorney, which is
4 significant, you need a new power of attorney because in order
5 to begin prosecution in the U.S., you need a U.S. practitioner
6 unless the inventors are going to prosecute themselves.

7 THE COURT: We are not at that stage in this case, we
8 are not talking about them entering the national stage. The
9 PCT application at issue was the PCT international application
10 filed with the Swedish patent office.

11 MR. ALDRICH: Right.

12 THE COURT: Not the second prong, which you just
13 indicated.

14 MR. ALDRICH: Right.

15 THE COURT: You said later on it can move.

16 MR. ALDRICH: Later on, which is what they did later
17 on.

18 THE COURT: But those weren't the documents that are
19 at issue in this case now.

20 MR. ALDRICH: That's correct, that's not. And
21 there's many privileged documents on the privilege log related
22 to the '834 patent and their other patents, we are not
23 pursuing those. We have never pursued -- as soon as we
24 understood any documents, I think there's well over 1,000
25 documents on the privilege log, as soon as we understood any

1 documents related to U.S. prosecution, we have not pursued
2 them. We've only pursued the documents that relate to these
3 completely separate filings for the PCT and the foreign
4 application.

5 And one other thing I should point out, again I don't
6 want to get too complicated here with patent filings, but the
7 one thing they keep pointing to was on the cover page of the
8 patent, it says related U.S. applications and there's a
9 different section that says priority applications, the reason
10 it has that is because there's a big difference between what
11 we call the earliest effective U.S. filing date, basically
12 there's a difference between a filing date and a priority
13 date. It makes a difference in what can be -- how far back
14 you can go in terms of what can be asserted as prior art.
15 Okay? So a PCT, and that's what this Section 363 of the
16 patent statute is about, a PCT counts as a U.S. filing date,
17 and that's why or I presume that's why on the face of the
18 patents it's listed as a related U.S. application not as a
19 priority.

20 THE COURT: Just so this record is clear, both you
21 and Ms. Loring began by referencing the face page of the
22 patent and it's in numerous submissions, can we just put a
23 Docket Number on there, please?

24 MS. LORING: Yes, your Honor. There's a copy of the
25 U.S. application in one of the declarations that we submitted,

1 a Burling declaration, and the Docket Number is 219-1.

2 THE COURT: Page 1 of documented 219?

3 MS. LORING: It's page 61 of 111 pages filed
4 August 30, 2010.

5 THE COURT: Right. So that the record is clear,
6 that's the document you're also referring to, Mr. Aldrich?

7 MR. ALDRICH: Yes, your Honor.

8 THE COURT: All right. So that the record is clear.
9 You can continue.

10 MR. ALDRICH: So that's essentially the difference
11 there. The benefit of a PCT is that you actually get to use
12 that as a U.S. filing date and not just as a prior art date,
13 which is a little less valuable.

14 You know, I don't know how much to get into the case
15 law that Ms. Loring was discussing, we've discussed this in
16 the briefing before. Odone, you know, it was an isolated case
17 that had -- you know, it made a comment with no analysis.
18 And, at the end of the day, the predominant interest that the
19 court found in that case was the U.S. discovery rules and
20 producing -- making sure that the documents were produced.
21 This one case, and it was unusual, at the end of the day the
22 court did -- this one case, it was an unusual case, and at the
23 end of the day the U.S. interest in producing the documents
24 was the predominant interest. This is all in prior briefing
25 but Ms. Loring again addressed, you know, the portion of the

1 Astra decision and it related to Korean documents.

2 THE COURT: Mr. Aldrich, I'm just going to ask you to
3 keep your voice up, if you could. The microphone is right
4 there.

5 MR. ALDRICH: Sure. I'm sorry.

6 Ms. Loring addressed the portion of the Astra decision
7 that related to not producing certain Korean documents. You
8 have to look at the country's laws as a whole. We've already
9 dealt with this in the briefing and the Court has already
10 considered this, I think, but just as a refresher, the Korean
11 instance was completely different. The Korean documents,
12 there was no privilege law. You couldn't invoke the privilege
13 law in Korean because there wasn't one because they had
14 extremely tight rules relating to producing documents. That's
15 why you, quote, unquote, couldn't look at it in a vacuum
16 because there was no Korean law -- no Korean privilege law to
17 apply. They don't need one because they're not producing
18 documents, period. Sweden is different. Sweden has privilege
19 law, and specifically it protects in-house and they have a
20 specific -- I mean -- sorry. It protects communications with
21 outside counsel and they have a specific policy of not
22 protecting the communications with in-house counsel because
23 in-house counsel can be subject to undue influence. Now, the
24 U.S. may have a different philosophy on that, but that's how
25 it works in Sweden and that's what their expectations are

1 there and that's what their policy is because they want to
2 protect against undue influence to in-house counsel.

3 As far as our cases, we said this in our brief, that's
4 correct that the cases don't explicitly -- the five or
5 six cases we cited, they don't explicitly say these
6 prosecution documents that we're looking at in a foreign
7 country are the priority documents. I mean, each of those
8 cases -- there was a U.S. case, it had priority to an
9 application in a particular country, the communications at
10 issue related to patent prosecution documents in that
11 particular country, I think with one exception that
12 Mrs. Loring pointed out, but all the other cases that was the
13 case. So for AstraZeneca to say we can't make assumptions on
14 the basis that, you know, those communications are related to
15 patent prosecution in that same particular foreign country
16 could actually relate to patent prosecution of some other
17 matter that was somehow related to the case, I think is a
18 little -- well, it's a little silly, frankly, to say those
19 cases suggest anything else.

20 Unless your Honor has any more questions about the PCT
21 filings and case law, I'll move on to the Swedish trade secret
22 argument.

23 THE COURT: You can move on with your argument.

24 MR. ALDRICH: Okay. Thank you, your Honor.

25 I guess the first one is that the Court held

1 AstraZeneca to the wrong standard of showing harm. And that's
2 not how we read the Opinion. I'm not going to presume to tell
3 the Court what it meant in that Opinion. But it seems to us
4 that AstraZeneca is continuing to miss the fact that they need
5 to ask for a motion for protective order if they want to
6 withhold documents that aren't covered by the attorney/client
7 privilege. We mentioned this previously. Your Honor
8 mentioned this in the Order.

9 It's their obligation to move for a protective order
10 under the federal rules and meet the standard for a showing of
11 good cause. Whether they're relying on some foreign law or
12 something else, they need to meet the standard of good cause.
13 And it doesn't matter -- I don't -- you know, we don't care
14 what we call that harm, whether it's a specific harm in this
15 case or harm that would typically occur in these types of
16 cases, the point is they didn't make the showing. They need
17 to make a clear showing of what that harm would be, what that
18 harm is or would be, and they didn't articulate that. They
19 didn't clearly articulate that. They still didn't do that
20 today. They haven't clearly identified -- they haven't made a
21 clear showing about what the supposed harm is, they just say
22 it would be.

23 And I guess then the second half of the Swedish
24 trade -- the application of Swedish trade secret law that
25 AstraZeneca has addressed is this, I guess it was the fifth

1 or -- fourth or fifth restatement factor that the Court
2 allegedly analyzed improperly. You know, and there's -- you
3 know, there's two parts of this. AstraZeneca has said it
4 conflicts with U.S. attorney/client privilege law. As your
5 Honor has already explained in your Honor's Order,
6 attorney/client privilege law is not relevant. The
7 attorney/client privilege law, that was the first half of
8 this, we analyzed that. The attorney/client privilege law
9 doesn't apply, Swedish privilege law does. And when you look
10 at Swedish privilege law, I was just talking about it a minute
11 ago, Swedish privilege -- in Sweden they have a specific
12 policy of not shielding communications with in-house counsel.
13 It's Sweden's interest that governs here when we're looking at
14 attorney/client privilege, and Sweden's law conflicts with
15 what AstraZeneca is trying to do.

16 THE COURT: Well, what about Ms. Loring's argument
17 that they don't have to have attorney/client privilege because
18 everything is protected under the trade secret?

19 MR. ALDRICH: Well, there's a couple things. The
20 first is that, as this Court already said in its Order, as
21 with all of these issues, the Court already addressed this in
22 its Order and explained that it's not that Sweden doesn't have
23 an interest but it's outweighed by the U.S.'s interests in
24 applying liberal discovery rules, which, you know, is the
25 predominant interest that the Odone court found. This is a

1 U.S. litigation, filed in U.S. court, it's governed by U.S.
2 rules, U.S. has a predominant interest in applying its
3 discovery rules liberally.

4 The second thing is that even Sweden's interest is --
5 to argue that Sweden has a strong interest in this is -- that
6 I think is a tough argument for AstraZeneca for two reasons.
7 First of all, this is not even -- Sweden's statute is not even
8 a blocking statute. Under Sweden law, they're allowed to
9 produce -- you know, documents can be produced and the court
10 can also order the documents produced in certain
11 circumstances, and are certainly free to do so, they're not
12 being -- they're not going to run into a conflict with this
13 court ordering them to produce them but Swedish law is telling
14 them they can. Even in those cases where you have blocking
15 statutes, there's an analysis to be performed. But this is
16 not that, they're certainly free to produce them.

17 And it's also -- I think it's a somewhat dubious
18 argument to say that, you know, that Sweden has a very strong
19 interest in protecting these type of communications under
20 their trade secret law, when they specifically have a policy
21 of excluding these types of communications from their
22 attorney/client privilege law. I just find that to be an odd
23 argument that they have a privilege law and they apply it to
24 outside counsel, they have a policy of not applying it to
25 in-house counsel, yet -- but under the trade secret law, they

1 allegedly have this strong interest in protecting in-house
2 communications under the trade secret law. I think that
3 argument's a little disingenuous.

4 THE COURT: Thank you. Anything further?

5 MR. ALDRICH: Thank you, your Honor that's it.

6 THE COURT: Any rebuttal argument?

7 MS. LORING: Yes, your Honor.

8 First of all, with respect to the letter we submitted
9 last week --

10 THE COURT: You would agree there was no leave of
11 Court that permitted such a filing right?

12 MS. LORING: I'm sorry, your Honor?

13 THE COURT: No leave of Court was granted to permit
14 such a filing, you would agree with that, right?

15 MS. LORING: That the Court did not --

16 THE COURT: Let me try it again. No leave of Court
17 was granted to permit that filing, you would agree with that?

18 MS. LORING: That is correct, your Honor. We filed
19 it as a letter because it was new evidence that we thought
20 might be useful to the Court.

21 THE COURT: When you say new evidence --

22 MS. LORING: New evidence because we didn't have
23 those documents until after receiving Apotex's opposition to
24 our motion for reconsideration. We looked for the documents
25 when we received your Honor's Order. Before that, we

1 believed, and still believe, that the Astra case on its
2 face -- and we've set out our analysis on Page 8 of our motion
3 for reconsideration, I won't go through it again, your Honor.
4 We believe that on its face Judge Jones said exactly what we
5 believe was the case, that there were documents in the Astra
6 submission that were communications between Astra employees
7 and in-house counsel that were properly withheld because --
8 were properly found to touch base with the United States
9 because they related to U.S. priority applications not U.S.
10 applications and not U.S. litigation, that's the way we read
11 that case and we expected your Honor would read it the same
12 way. When your Honor did not, we said let's see if we can
13 find these documents. We were unable to find them. This was
14 a situation where the counsel for Astra had moved firms and
15 the documents, I gather, were somehow lost in the shuffle and
16 we could not find them. Then when we received Apotex's
17 response to our motion for reconsideration, we went back and
18 said please try to find these documents, and they found them
19 and we provided them to your Honor.

20 THE COURT: You provided privilege logs.

21 MS. LORING: By the way, your Honor, we did offer
22 them for *in camera* inspection and we offer them now for
23 *in camera* inspection. I take issue with Mr. Aldrich's comment
24 that we implied that they did not relate to the U.S.
25 application. I believe we stated quite clearly that they did

1 not relate to the U.S. application. You can tell that by
2 looking at the dates on the privilege log, which precede the
3 filing of the PCT priority application and the declaration of
4 the Astra employee or former Astra employee describing those
5 documents. Mr. Aldrich may not look at them because they're
6 privileged but your Honor may if you are -- if you have a mind
7 to do that.

8 THE COURT: I'm going to review the objections by
9 Apotex and also the arguments and if I determine that it's
10 necessary for me to review, we'll advise counsel. But at this
11 time I'm not prepared to have you hand them up, I'm not
12 prepared to accept the late filing or the filing by letter
13 without leave of Court to include documents in a related
14 matter, not a related matter, in a separate litigation to
15 inform the Court of what another judge said or decided in
16 another opinion. Basically you want me to look at evidence
17 from another case.

18 MS. LORING: Well, your Honor --

19 THE COURT: I mean, you would agree it's not relevant
20 to this case.

21 MS. LORING: Well, it is relevant to this case, your
22 Honor, I submit, because it supports our reading of that
23 decision.

24 THE COURT: Well, you have the ability to obtain the
25 document because it happened to be the same client, but you

1 don't -- you're not submitting all the *in camera* documents
2 that were reviewed by the other courts in all the cases cited.
3 You have to agree it's evidence from another case or
4 submission in another case. I can't even say it was evidence,
5 it's a submission in another case.

6 MS. LORING: It's a submission in this case.

7 THE COURT: Not in this case here.

8 MS. LORING: No, it was a submission in the *Astra*
9 case.

10 And, your Honor, let me just take a moment to walk
11 through the *Astra* decision because we believe that what Judge
12 Jones found was that these documents, which do not relate to a
13 U.S. application, touch base with the United States based on
14 the plain reading of the decision, your Honor. And we
15 supplied those documents only in the belief that it would
16 clarify for your Honor what this case said.

17 THE COURT: All right. I understand your position.
18 If I decide that I want to take a look at the documents, we
19 will advise you, but I don't need you to hand them up at this
20 time.

21 MS. LORING: Okay. Thank you, your Honor.

22 In terms of the touching base inquiry, Mr. Aldrich
23 stated that the decision is not about the product, it's about
24 the patent and that the documents at issue relate to the
25 filing and prosecution of a patent application. Well, I think

1 those -- I disagree strongly with both of those comments.

2 First of all, whether or not something touches base is
3 a very factual inquiry. And if you look at all of the cases
4 cited by all of the parties, the courts look into the
5 documents themselves, who generated them, what the role of
6 that person was, whether there was legal advice involved,
7 whether or not there was a U.S. interest implicated. And so
8 the fact that the invention was at least in part made in this
9 country through a U.S. inventor in conjunction with Swedish
10 inventors is very much the point, your Honor. And this is
11 very much about not the product but the basis for the
12 invention in the '834 patent.

13 He also said -- he also erred when he said that the
14 documents relate to filing and prosecution. They do not.
15 They relate to the preparation of draft patent applications.
16 And that's very clear not only from our descriptions in the
17 brief but from the privilege log. There are draft patent
18 applications. There are communications between the Astra
19 inventors and the in-house lawyers about those draft patent
20 applications both with respect to the Swedish application and
21 with respect to the PCT application. Those documents are
22 neither about the filing nor are they about the prosecution of
23 either of those applications. Those documents we did not
24 withhold.

25 THE COURT: Can you say that again?

1 MS. LORING: We did not withhold.

2 THE COURT: The whole argument you just made about --

3 MS. LORING: I said the documents we withheld are
4 neither about the filing or the prosecution of the Swedish or
5 PCT application, they are about the preparation of the PCT and
6 Swedish application.

7 THE COURT: Well, can you distinguish what you mean
8 between preparation --

9 MS. LORING: And prosecution?

10 THE COURT: You just said -- I want to make sure I
11 get your argument correct. You're arguing that the withheld
12 documents based on the privilege log has a general
13 description, nature of the document, you're saying the
14 documents that are withheld do not relate to the filing and
15 preparation --

16 MS. LORING: Filing and prosecution.

17 THE COURT: Filing and prosecution of the Swedish
18 patent, Swedish application or the PCT application, but they
19 relate to the preparation.

20 MS. LORING: Yes, your Honor.

21 THE COURT: Tell me the difference.

22 MS. LORING: Why that's relevant?

23 THE COURT: Exactly.

24 MS. LORING: That's relevant because prosecution in
25 Sweden may very well not relate to the touch base with the

1 United States, it might under certain circumstances but it may
2 not because there you're involved with issues of Swedish law,
3 whether a patent application meets the requirements of Swedish
4 law, whether the claims are proper in light of the prior art
5 under Swedish law. But when you're preparing a patent
6 application and you have in your mind, as did James Peel and
7 the folks at Astra that he will be filing this application in
8 the United States, and this argument goes to the Swedish
9 application as well as the PCT application, then there is a
10 U.S. interest involved because you have in mind U.S. law
11 because those priority applications become part of the U.S.
12 file history, they are relevant for claim construction, they
13 are relevant for priority dates, they're relevant for all
14 sorts of reasons, and therefore there is a tremendous
15 distinction between preparation of a priority application and
16 prosecution in a foreign country of that application. And
17 that's a distinction that Apotex would like to blur and we
18 think that that led you astray, your Honor, respectfully.

19 THE COURT: Do you acknowledge what Mr. Aldrich said,
20 which is on the PCT application the United States is not the
21 only country designated?

22 MS. LORING: That is true. I doubt very much, and I
23 don't believe that Mr. Aldrich meant to imply that AstraZeneca
24 filed in 122 countries, but I don't have the PCT application in
25 front of me.

1 THE COURT: No, his comment was it's an international
2 application, it's not just designated in the U.S., it's
3 designated in a whole number of countries.

4 I think that was your point, Mr. Aldrich.

5 MR. ALDRICH: That's correct, not that they filed in
6 122 -- I think 122 countries were designated.

7 THE COURT: So to suggest that because the U.S. is
8 designated, I think the argument was AstraZeneca can easily
9 argue it's a German patent or it's a Japanese patent because
10 it's designating those countries as well. Is that your
11 argument?

12 MR. ALDRICH: That was our argument.

13 MS. LORING: I think if you look at a PCT application
14 in a vacuum, as Apotex is doing in order to make that
15 argument, you might draw that conclusion. I think again you
16 need to look at all of the facts and the fact that not only
17 was this application designated as part of the U.S. from the
18 beginning, that James Peel had it in his head to file in the
19 United States from the beginning because the invention was
20 made for the U.S. market, that the PCT designated at the time
21 of filing, all of those things taken together, not teased
22 apart separately, indicate the strong U.S. interest. That the
23 United States is the largest pharmaceutical market in the
24 world and therefore highly important to AstraZeneca as
25 Christer Wahlstrom stated in his declaration.

1 The Swedish receiving office -- the whole notion -- and
2 I don't prosecute patent applications, but my understanding of
3 the PCT is that you filed in a receiving office but that could
4 be any office in the -- it could be the United States, it
5 could be Sweden. The fact that it was filed in Sweden as
6 opposed to the U.S., does not change the fact that under
7 Section 363, as of that filing date, it is a U.S. application.
8 They could just as well have filed in the U.S. receiving
9 office and to the same effect.

10 The other thing that --

11 THE COURT: Where in 363 does it say filing -- it
12 used the word international application.

13 MS. LORING: It is an international application.

14 THE COURT: It says if you designate the U.S., you'll
15 have the effect concerning its international filing date.
16 Where does it say, I think what you want me to read in part
17 from the statute is the following, "an international
18 application designating the United States constitutes a United
19 States application," that's how you want me to read 363. I
20 don't see that language in there, I see it talks about filing
21 dates.

22 MS. LORING: Your Honor, I actually read it like
23 that. But at the end of the day I think it doesn't matter for
24 all of the reasons I articulated, it's the connection in the
25 real world facts that's important.

1 But one thing I do want to address before I get off
2 that point, when Mr. Aldrich talked about the difference
3 between a priority application and a priority date and
4 effective date, that's totally irrelevant, your Honor. What I
5 was focusing on was not the priority date versus the effective
6 date, what I was focusing on was the characterization of the
7 Swedish application as foreign and the U.S. application -- and
8 the PCT application as a U.S. application. You could have
9 filed a U.S. priority application -- I guess you can't file a
10 U.S. priority application. But if you file -- the point of
11 what I was saying was it's got nothing to do with the priority
12 date or effective date, it's the characterization of the
13 application as either foreign or U.S.

14 THE COURT: Well, there's a third category that you
15 keep skipping called international.

16 MS. LORING: I'm sorry, your Honor.

17 THE COURT: There's a third category of applications;
18 there's a U.S. application, there's a foreign application, and
19 then there's an international application.

20 MS. LORING: There is. But the PCT application,
21 which is an international application, is identified on the
22 face of the patent as a U.S. application, that's the point.

23 THE COURT: Identified by AstraZeneca.

24 MS. LORING: No. No. No. No. By the U.S. patent
25 office.

1 THE COURT: This is the document we've already had
2 some discussion?

3 MS. LORING: The '834 patent.

4 THE COURT: The docket number 161.

5 MS. LORING: Yes, your Honor.

6 THE COURT: Okay. I understand your argument.

7 You would agree, though, that there's absolutely no
8 case law that you have discovered and submitted to the Court
9 that says designating the United States on an international
10 application constitutes making that international application
11 a U.S. application for all purposes?

12 MS. LORING: Your Honor, I have found no such case.
13 But to be honest with you, I don't see any reason for a case
14 because Section 363 is clear.

15 But passing that, I really think, your Honor, that the
16 point is the facts, the relationship of that --

17 THE COURT: The real world connection.

18 MS. LORING: The real world connection, the Swedish
19 application and the PCT application.

20 Moving on to the *Odone* case, Apotex continues to call
21 that an isolated case, an outlier, and to be honest with you I
22 have no idea where they get that from. It is one of two cases
23 that either party has been able to find that has analyzed this
24 issue. There are not 100 cases on one side and *Odone* on the
25 other side. There are *Odone* and *Astra* and nothing else. And,

1 your Honor, to say that there was no analysis in that case, we
2 quoted from the case in our brief on Page 6 where the court
3 there said -- went through the facts and analyzed the
4 relationship between those applications and the United States
5 and said "It would be nonsense for this court to find that the
6 documents at issue do not touch base with the United States."
7 And then they talk about the fact that there was a U.S.
8 inventorship question. And then they say, "Finally the
9 defendant acknowledges that it is upon this British patent,"
10 that was at issue in the documents, "that the later U.S.
11 application, the patent in suit is claiming priority pursuant
12 to the international Patent Cooperation Treaty, PCT, and is
13 seeking protection under a letter patent from the United
14 States Patent and Trademark Office." In so finding, the court
15 cited 35, U.S.C., Section 363. This did not come out of our
16 dreams, this came out of *Odone*. And the *Astra* court, in
17 finding that those documents in our letter touched base with
18 the United States, cited *Odone* and said -- characterized *Odone*
19 as holding that, I can't find the quote right now, but
20 something to the effect of not only the United States'
21 documents touched base with the United States. So the court
22 in finding that the documents at issue touched base with the
23 United States, cites *Odone* and says finding that
24 communications involving not only United States patents but
25 also the foreign priority applications of U.S. patents touched

1 base with the United States. And that's at Page 99 of the
2 *Astra* case.

3 THE COURT: Okay.

4 MS. LORING: Back to the Apotex six cases, I
5 reiterate what I said before. The *Golden Trade* case is a
6 lesson for not being able to draw conclusions about what those
7 cases stand for. And if you read those cases, your Honor,
8 carefully, as I'm sure you have, you will see that several of
9 them, the *Golden Trade* case in particular, but others of them
10 also talk about prosecution as opposed to preparation. And so
11 again those cases don't specifically state -- not only do they
12 not specifically state that the U.S. priority application was
13 at issue in the withheld documents, they don't describe the
14 documents, your Honor. How can we draw conclusions contrary
15 to the clear holdings in *Astra* and *Odone* when those cases
16 don't describe the documents at issue.

17 In terms of the Swedish law, Mr. Aldrich said we didn't
18 make a showing of harm. To the contrary, we did.

19 THE COURT: Let me ask you to address one point.

20 MS. LORING: Sure.

21 THE COURT: You're asserting Swedish trade secret law
22 protects the documents. Now put aside any attorney privilege
23 issue, if that's the case, isn't it your burden to file a
24 motion for protective order in a U.S. litigation that's
25 governed by the federal rules if you are hoping to withhold

1 otherwise relevant documents on a basis other than
2 attorney/client privilege?

3 MS. LORING: Well, your Honor, I have a hard time
4 separating the attorney/client privilege issue. We listed
5 those documents on our privilege log because we believed they
6 were privileged.

7 THE COURT: But put aside that. See if you can
8 answer the specific question. In a U.S. litigation governed
9 by the Federal Rules of Civil Procedure and, obviously,
10 Federal Rule 26, and the discovery request calls for documents
11 and there's a reason why the documents can't be produced
12 because of a trade secret issue, isn't it the burden of a
13 party to make a motion for a protective order under Rule 26?

14 MS. LORING: The basis of the trade secret is
15 attorney advice. And so we didn't -- we don't view that as
16 requiring a motion for a protective order. The problem with
17 that, regardless of how it got before your Honor, the problem
18 with applying a protective order standard is it eviscerates
19 the Swedish law because it substitutes what burden would take
20 place in Sweden with a protective order burden here.

21 THE COURT: Let's assume it's just a trade secret for
22 some other reason not a trade secret governed by a Swedish
23 law, wouldn't the general -- generally if you're not going to
24 produce relevant discovery, you need to seek a protective
25 order?

1 MS. LORING: If it were a technical trade secret,
2 then under U.S. law we would be filing a motion for protective
3 order.

4 THE COURT: Of course this case is governed by the
5 Federal Rules of Civil Procedure, you would agree, right?

6 MS. LORING: Yes.

7 THE COURT: Do you have any case law that supports
8 your position that AstraZeneca is excused from Rule 26 because
9 the basis of its assertion of the trade secret is because it's
10 attorney advice?

11 MS. LORING: I do not have any cases to that effect,
12 your Honor.

13 THE COURT: All right.

14 MS. LORING: At the end of the day we submit,
15 regardless of the standard that applies, we have met that
16 burden. And that is clear from the Sande declaration that
17 talks about, and Wahlstrom declaration that talks about the
18 importance of attorney/client privilege and from the case law,
19 the Astra case, the Golden Trade case, and the VLT Corp. case
20 that all recognize the alignment of foreign law and U.S. law
21 in protecting attorney advice. And the damage -- the Apotex's
22 characterization of the compelling importance and sacredness
23 of attorney advice, the notion articulated by the Supreme
24 Court of wanting to encourage frank discussions among lawyers
25 and their clients, and all of that shows clearly in this

1 country a protective order is not sufficient to protect
2 privileged attorney advice. And the fact that the documents,
3 assuming that the documents don't touch base with the United
4 States, doesn't change the attorney advice present in those
5 documents, doesn't alter the nature of those documents. If
6 you substituted Swedish PCT for U.S. application, those
7 documents would be protected under U.S. law.

8 So that's the harm in disclosure of our attorney advice
9 from a European patent lawyer to the inventors would never be
10 required to be disclosed in the United States, and that's the
11 damage that, the harm to AstraZeneca if they had to be
12 produced.

13 THE COURT: Okay. Thank you.

14 MS. LORING: Thank you, your Honor.

15 THE COURT: Any sur-reply?

16 MR. ALDRICH: Just a couple things briefly, your
17 Honor.

18 Ms. Loring a couple of times mentioned about the
19 sacredness of the attorney/client privilege, and we argue that
20 ourselves in letter briefing, and that's true and both
21 countries agree about that, both countries hold that the
22 attorney/client privilege should be protected. The two
23 countries have a different opinion about whether that should
24 be extended to in-house counsel. And it's not unreasonable
25 that it's an issue that U.S. case law went through at one

1 time, and it's not unreasonable that Swedish law has a
2 different opinion about whether that privilege should be
3 extended to in-house counsel. They have a clearly expressed
4 policy of why they don't think it should be extended to
5 in-house counsel, they think in-house counsel may be subject
6 to undue influence.

7 Really quick points. Again, there still seems to be
8 some confusion about what the face of the patent shows. The
9 face of the patent has a lot of basic information, included in
10 that are a number of relevant dates, shows the family history,
11 you can have multi continuation applications, priority
12 applications --

13 THE COURT: Can I ask you to speak a little slower
14 and louder?

15 MR. ALDRICH: I'm sorry.

16 So the face of the patent has a lot of basic
17 information about the patent, a lot of basic historical
18 information about the patent and related applications, you can
19 have multiple continuing applications, priority applications,
20 so it gives those relevant dates so all the information is
21 available. And the two different sections, Ms. Loring keeps
22 pointing to the one that says related U.S. applications and
23 that lists the PCT and that is because the PCT counts as a
24 U.S. filing date, but that's it. It's not a U.S. application
25 in any way but that date counts as the U.S. filing date just

1 as it would count as a filing date in many other countries.

2 THE COURT: Can you address Ms. Loring's argument
3 that, putting aside whether the PCT is a U.S. application,
4 what the Court should really focus on is connection in the
5 real world facts and that the inventor was in the United
6 States?

7 MR. ALDRICH: Yes, your Honor.

8 There was three inventors on this patent, one was the
9 U.S., two were in Sweden. You know, this is -- this is a
10 Swedish company that's in Sweden. These communications took
11 place there. Two of the inventors were there. The first two
12 applications, the Swedish application and the PCT application,
13 were filed there. The international prior art search was
14 conducted there. Is there some connection with the U.S.? I
15 mean, they ultimately filed a U.S. application, you can say
16 that's a connection. But it's, as your Honor explained,
17 incidental connection. You can have that type of connection
18 in many different countries. All right? Ms. Loring keeps
19 talking about how they -- when they drafted these
20 applications, they had in mind that they were filing in the
21 U.S. I'm sure they had in mind that they would file in many
22 countries. You know, having in mind that, you know, there
23 might be some future application in a particular country,
24 doesn't render it -- I'm not articulating this well.

25 But, you know, the trouble we're having with this is

1 whose law do you apply then? I don't remember what countries
2 AstraZeneca ultimately filed in, but I'm sure they were
3 expecting to file in many countries at the time they prepared
4 this application. And that fact alone, if you're going to use
5 that to say that falls under the particular country's
6 attorney/client privilege law, then who -- which country's law
7 do we apply. That's too tenuous of a connection.

8 THE COURT: Okay. Anything further?

9 MR. ALDRICH: The only other thing I want to mention
10 really quick, your Honor, was Ms. Loring was making a
11 distinction between preparing draft application versus
12 prosecution. It's a matter of semantics. I mean, I consider
13 that all prosecution. You draft the patent application to
14 submit to the patent office. You submit it. They send you an
15 office action. Then you draft a response to that office
16 action and submit it. They usually will submit another office
17 action -- you know, these are all things that you prepare and
18 submit to the patent office, that's part of the prosecution.
19 This is splitting hairs to say that the preparation of the
20 application is a different category of some sort. They were
21 preparing a draft application to submit in Sweden. And then
22 they were preparing a draft application -- a draft
23 international patent application that they then filed in
24 Sweden and that the Swedish patent office was designated to
25 deal with it.

1 So that's all I have, your Honor, unless you have any
2 questions.

3 THE COURT: Thank you.

4 Anything further, Ms. Loring?

5 MS. LORING: One small point, your Honor, to address
6 Mr. Aldrich's comment about Astra being a Swedish -- having an
7 inventor in the United States. Actually, Astra at that time
8 had facilities all over the United States, including the
9 Waltham, Massachusetts, the site where Budesonide was to be
10 manufactured. The site where Budesonide was -- the
11 manufacturing process was developed by, among others, Cheryl
12 L'arrivee-Elkin, the inventor. And so it wasn't that she just
13 happened to live here, it was that the facility was here. The
14 examples in the patent flow directly out of Cheryl
15 L'arrivee-Elkin work done in the United States. The question
16 of what -- well, I can't disclose that, that's confidential.
17 But the discussions of what to put in the patent application
18 based on U.S. regulations are part of those communications.
19 And so she was providing input, as you can see from the priv
20 log, into how the application was going to be shaped in the
21 context of U.S. rules and regulations. This is the real world
22 connection between the United States, the making of the
23 invention, and those patent applications.

24 THE COURT: Thank you.

25 Anything further?

1 MR. ALDRICH: Nothing further, your Honor.

2 THE COURT: Anything further?

3 MS. LORING: No, your Honor.

4 THE COURT: I'm going to close the arguments at this
5 time. I'm going to review the arguments and I'm going to
6 reserve my decision and hope to be able to issue an Opinion
7 shortly.

8 Is there anything else we need to address today in this
9 case from a status point of view?

10 MR. HENDLER: Yes, your Honor.

11 Your Honor, you had previously extended the stay on
12 your Order until, I believe, the close of business today or at
13 least the end of the day today. And in view of the arguments,
14 we're inclined to ask that you extend the stay until your
15 Honor has issued your ruling.

16 THE COURT: Any objection?

17 MR. ALDRICH: I guess we don't object until we get
18 your ruling, your Honor. If I -- there is one thing I would
19 like to add, though, with respect to the stay. When we last
20 had -- we had the telephone conference hearing with your
21 Honor, one --

22 THE COURT: You'll have to remind me which one in
23 this case. You mean the most recent?

24 MR. ALDRICH: The most recent one.

25 THE COURT: Okay.

1 MR. ALDRICH: Where your Honor looked at the standard
2 for a stay and then analyzed the various issues. And your
3 Honor had posed a question at that time if Apotex agreed
4 that the harm to AstraZeneca not extending the stay would be
5 that the privilege would be waived once they overturned it.
6 And I was on the phone at that time, your Honor, and I
7 answered I didn't know the answer to that question whether it
8 would or would not be waived. Subsequently we looked up the
9 answer to that question. It's clearly established that
10 judicially compelled disclosure does not constitute a waiver.
11 So this, I think, significantly affects the analysis of that
12 prong. There would not be any permanent damage to AstraZeneca
13 by not indefinitely continuing the stay. That if it turned
14 out that there was a ruling and that ruling was later
15 incorrect, those documents could be returned and not be usable
16 against them in the case just like they had produced
17 privileged documents that they requested back.

18 And, you know, in the meantime I understand that your
19 Honor doesn't want to do this -- doesn't want to lift the stay
20 today, but I'm worried about it getting extended indefinitely
21 as this issue continues to be appealed.

22 THE COURT: Why don't I, if it's agreeable to both
23 counsel, grant the request to continue the stay pending
24 decision by the Court. And then depending on how I rule, the
25 parties will have to make whatever applications they need to

1 make. Is that acceptable?

2 MR. HENDLER: Yes, your Honor.

3 MR. ALDRICH: Just for clarity, your Honor, it will
4 be extended until the day your Honor rules?

5 THE COURT: Well, let's play out two scenarios.
6 Either I deny the motion -- three scenarios. I deny the
7 motion for consideration and put in the Order a period of time
8 for the production. In which case then AstraZeneca, if they
9 appeal, appeal and they'll have a motion for a stay and you'll
10 have to oppose it.

11 I could grant the motion for reconsideration and still
12 require the documents to be produced, which again leads to the
13 scenario. I would put a date and time for the production, it
14 wouldn't be immediate, it probably would be ten days. And if
15 at that time AstraZeneca wanted to make an application to stay
16 to Order pending appeal, they would have to make that
17 application and you would oppose it.

18 The third option, I'm not putting them in any
19 particular order, is I grant the motion for reconsider -- I
20 consider changing my mind based on the application, in which
21 case there's nothing to stay because there would be no Order.

22 That's how I see it playing out. Would the parties
23 agree those are the three alternatives?

24 MR. HENDLER: I'm not sure about the second
25 alternative, it's not clear to me, but I think that would

1 certainly capture the world of alternatives.

2 THE COURT: Another one is you didn't make the
3 showing to reconsider and I don't reconsider.

4 MR. HENDLER: Oh, I'm sorry. I thought you said you
5 would grant the reconsideration.

6 THE COURT: I'm not sure what order I did it.

7 MR. HENDLER: Okay.

8 THE COURT: Let me say it again.

9 Either I grant the motion for reconsideration,
10 reconsider and again compel documents to be produced, I deny
11 the motion for reconsideration and compel the documents to be
12 produced, or I grant the motion for reconsideration and then
13 deny the producing of the documents.

14 MR. HENDLER: I'm sorry, your Honor, I understand
15 now.

16 THE COURT: So I will continue the stay but I will
17 put in the Order it's without prejudice to either parties'
18 argument to assert that the stay should continue or be
19 dissolved -- it's going to be automatically dissolved if I
20 deny the reconsideration or I further compel the documents.
21 So, Mr. Aldrich, I'll note for the record today you don't
22 object but I presume that I'll note for the record you want to
23 preserve your arguments and you don't agree to a stay
24 indefinitely.

25 MR. ALDRICH: Correct, your Honor.

1 THE COURT: And I'm going to grant the stay pending
2 my ruling. And I will address in my ruling what happens with
3 respect to the documents once I decide to application. Is
4 that acceptable?

5 MR. ALDRICH: Yes, your Honor. I would ask, I'm not
6 sure of the timing in terms of filing the stay. I would ask,
7 if possible, being optimistic and saying if the Court does
8 deny the motion for reconsideration, when the documents be
9 produced, is it possible that that could include an expedited
10 schedule for any stay?

11 THE COURT: If there's an appeal, it's up to the
12 district judge, that's not for me. I don't know where the
13 stay -- the stay may go before me. So AstraZeneca will make
14 whatever application and you'll make whatever response, I'm
15 not going to put any time lines in it today.

16 MR. ALDRICH: Okay.

17 MR. HENDLER: That's fine, your Honor.

18 THE COURT: Anything else that we need to address
19 today?

20 MR. HENDLER: Nothing from AstraZeneca.

21 MR. ALDRICH: Nothing from Apotex, your Honor.

22 THE COURT: How about our other defendants here?

23 MR. PLUTA: Nothing from Sandoz, your Honor.

24 MR. SALMEN: Nothing from Breath, your Honor.

25 THE COURT: The ones that are before me, I'll address

1 and then deal with the experts. And I'll be ruling shortly on
2 this Dr. Barnes issue. The motions to seal -- the *Markman*
3 hearing would be before the district judge. No one objects to
4 each other's motions to seal, right?

5 MR. HENDLER: That is correct.

6 MR. ALDRICH: Correct for Apotex, your Honor.

7 MR. SALMEN: Correct for Breath as well, your Honor.

8 MR. PLUTA: And Sandoz.

9 THE COURT: I looked at them recently, I will say it
10 on the record today, when you get the Order you can take care
11 of it, you all have been filing under seal en masse, the whole
12 brief is under seal, and that is not the least restrictive way
13 of handling it. So I may be denying in part some of the
14 motions to seal, sealing currently but ordering you to file
15 redacted versions of briefs on the docket, and you'll see that
16 when I enter the Order. But the filing of a brief completely
17 under seal is generally not warranted even if you end up
18 redacting significant portions of the brief. Okay?

19 Anything further? All right, counsel, thank you very
20 much. Everyone have a nice day and safe travel.

21 We are adjourned.

22 (Proceedings Concluded.)

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C E R T I F I C A T E

I, LISA MARCUS, Official Court Reporter for the United States District Court for the District of New Jersey, Certified Shorthand Reporter and Notary Public of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcription of my original stenographic notes to the best of my ability of the matter hereinbefore set forth.

LISA MARCUS
Official U.S. Reporter
N.J. Certificate No. XI01492

DATE: June 1, 2011

	312 [1] - 3:8 324-6155 [1] - 2:16 35 [2] - 15:25, 46:15 363 [9] - 15:9, 15:25, 16:5, 28:15, 43:7, 43:11, 43:19, 45:14, 46:15	accept [1] - 37:12 acceptable [2] - 57:1, 59:4 account [1] - 25:10 accurate [1] - 61:12 accurately [1] - 25:8 acknowledge [1] - 41:19 acknowledged [2] - 11:3, 13:2 acknowledges [1] - 46:9 action [3] - 53:15, 53:16, 53:17 ACTION [3] - 1:4, 1:10, 1:15 activated [1] - 14:17 Adam [1] - 4:12 add [1] - 55:19 addition [1] - 18:24 address [10] - 11:15, 21:5, 44:1, 47:19, 52:2, 54:5, 55:8, 59:2, 59:18, 59:25 addressed [6] - 13:7, 21:24, 29:25, 30:6, 32:25, 33:21 addresses [1] - 10:23 addressing [1] - 23:21 adequate [1] - 6:9 adjourned [1] - 60:21 admission [1] - 12:17 adopted [1] - 8:5 advice [15] - 6:8, 8:9, 10:2, 18:13, 18:19, 20:21, 39:6, 48:15, 49:10, 49:21, 49:23, 50:2, 50:4, 50:8 advise [2] - 37:10, 38:19 advocate [1] - 18:11 affects [1] - 56:11 afternoon [12] - 4:3, 4:7, 4:14, 4:15, 4:21, 4:22, 4:24, 5:1, 5:2, 5:4, 5:8, 5:9 agent [2] - 9:13, 10:1 agents [3] - 7:16, 9:8, 9:10 ago [3] - 14:15, 21:24, 33:11 agree [13] - 10:19, 11:7, 11:10, 35:10, 35:14, 35:17, 37:19, 38:3, 45:7, 49:5, 50:21, 57:23, 58:23 agreeable [1] - 56:22 agreed [1] - 56:3 ahead [1] - 17:7 ALDRICH [36] - 2:14, 4:21, 21:2, 21:4, 21:9, 23:20, 24:13, 26:3, 26:6, 26:10, 27:11, 27:14, 27:16, 27:20, 29:7, 29:10, 30:5, 31:24, 33:19, 35:5, 42:5, 42:12, 50:16, 51:15, 52:7, 53:9, 55:1, 55:17, 55:24, 56:1, 57:3, 58:25, 59:5, 59:16, 59:21, 60:6 Aldrich [13] - 4:19, 21:2, 21:3, 29:6, 30:2, 37:5, 38:22, 41:19, 41:23, 42:4, 44:2, 47:17, 58:21 Aldrich's [2] - 36:23, 54:6 aligned [2] - 9:15, 12:2 alignment [2] - 9:17, 49:20 allegedly [3] - 24:3, 33:2, 35:1 allow [1] - 21:17 allowed [1] - 34:8 alone [1] - 53:4 alter [1] - 50:5
'834 [10] - 6:21, 7:10, 7:12, 13:24, 16:8, 16:11, 16:19, 27:22, 39:12, 45:3		
0	4	
06905-5619 [1] - 2:15 07095 [1] - 2:22 07102 [2] - 2:4, 2:19 07102-5311 [1] - 3:4 08-1512 [2] - 1:10, 4:5 08101 [1] - 1:20 08543 [1] - 2:12 09-4115 [1] - 1:5	4 [1] - 15:10 424-2000 [1] - 2:19 4TH [1] - 1:20	
	5	
	500 [1] - 3:7 596-9000 [1] - 2:9	
1	6	
1 [2] - 29:2, 61:17 1,000 [1] - 27:24 10-5785 [1] - 1:16 100 [2] - 2:4, 45:24 10036 [1] - 2:8 102 [1] - 19:16 10th [1] - 3:3 11 [1] - 16:2 111 [1] - 29:3 120 [2] - 25:13, 25:19 1200 [1] - 2:18 1211 [1] - 2:8 122 [4] - 26:3, 41:24, 42:6 1480 [1] - 2:22 1492 [1] - 1:25 161 [1] - 45:4	6 [2] - 3:7, 46:2 60610 [1] - 3:7 609 [1] - 2:12 61 [1] - 29:3 622-3333 [1] - 3:4 622-4444 [1] - 2:5 63 [1] - 16:15 636-4500 [1] - 2:23 649 [1] - 11:1	
	7	
	732 [1] - 2:23 734-6395 [1] - 2:12 744 [1] - 2:18	
2	8	
2010 [1] - 29:4 2011 [2] - 1:21, 61:17 202 [1] - 2:11 203 [1] - 2:16 204 [1] - 2:22 212 [1] - 2:9 219 [1] - 29:2 219-1 [1] - 29:1 222-6301 [1] - 3:8 23 [1] - 1:21 26 [3] - 48:10, 48:13, 49:8 26(c) [1] - 17:18 26(c) [1] - 17:23 2d [1] - 11:1	8 [1] - 36:2 856 [1] - 1:21	
	9	
	9 [2] - 2:22, 15:15 968-4986 [1] - 1:21 973 [3] - 2:5, 2:19, 3:4 986 [1] - 2:15 99 [1] - 47:1	
3	A	
30 [2] - 16:13, 29:4 309 [1] - 11:1	AB [3] - 1:3, 1:8, 1:13 ability [2] - 37:24, 61:13 able [4] - 10:9, 45:23, 47:6, 55:6 absolute [1] - 20:1 absolutely [3] - 10:21, 19:22, 45:7	

<p>alternative [1] - 57:25</p> <p>alternatives [2] - 57:23, 58:1</p> <p>Americas [1] - 2:8</p> <p>analysis [13] - 12:24, 13:3, 13:5, 17:24, 18:9, 18:13, 20:8, 24:5, 29:17, 34:15, 36:2, 46:1, 56:11</p> <p>analyzed [6] - 17:16, 33:2, 33:8, 45:23, 46:3, 56:2</p> <p>analyzing [1] - 23:24</p> <p>AND [1] - 1:20</p> <p>ANN [1] - 1:22</p> <p>answer [3] - 48:8, 56:7, 56:9</p> <p>answered [1] - 56:7</p> <p>anyway [1] - 23:15</p> <p>apart [1] - 42:22</p> <p>Apotex [26] - 4:16, 4:18, 7:19, 9:23, 11:13, 11:19, 12:6, 12:17, 13:1, 13:10, 15:13, 15:14, 17:25, 18:18, 18:25, 19:1, 20:6, 21:1, 37:9, 41:17, 42:14, 45:20, 47:4, 56:3, 59:21, 60:6</p> <p>APOTEX [4] - 1:11, 2:13, 2:16</p> <p>Apotex's [8] - 8:5, 11:15, 11:23, 12:17, 24:2, 35:23, 36:16, 49:21</p> <p>appeal [4] - 57:9, 57:16, 59:11</p> <p>appealed [1] - 56:21</p> <p>appearances [1] - 4:5</p> <p>application [164] - 5:22, 7:14, 7:21, 7:22, 7:23, 7:25, 8:1, 8:3, 8:4, 8:6, 8:7, 8:18, 8:23, 9:2, 10:12, 12:9, 12:18, 13:16, 13:17, 13:24, 13:25, 14:2, 14:3, 14:4, 14:9, 14:10, 14:11, 14:14, 14:15, 14:16, 14:17, 14:21, 14:22, 15:10, 15:15, 15:19, 15:20, 15:21, 15:22, 15:24, 16:1, 16:3, 16:6, 16:7, 16:9, 16:13, 16:14, 16:16, 16:17, 16:18, 16:19, 16:20, 16:23, 17:12, 17:15, 20:17, 23:11, 23:25, 24:7, 24:14, 24:15, 24:18, 24:21, 24:25, 25:1, 25:4, 25:6, 25:12, 25:16, 25:17, 25:21, 25:23, 25:24, 26:1, 26:5, 26:6, 26:17, 26:20, 27:2, 27:9, 28:4, 28:18, 28:25, 31:9, 32:24, 36:25, 37:1, 37:3, 38:13, 38:25, 39:20, 39:21, 40:5, 40:6, 40:18, 41:3, 41:6, 41:7, 41:9, 41:15, 41:16, 41:20, 41:24, 42:2, 42:13, 42:17, 43:7, 43:12, 43:13, 43:18, 43:19, 44:3, 44:7, 44:8, 44:9, 44:10, 44:13, 44:18, 44:19, 44:20, 44:21, 44:22, 45:10, 45:11, 45:19, 46:11, 47:12, 50:6, 51:24, 52:3, 52:12, 52:15, 52:23, 53:4, 53:11, 53:13, 53:20, 53:21, 53:22, 53:23, 54:17, 54:20, 57:15, 57:17, 57:20, 59:3, 59:14</p> <p>applications [41] - 6:15, 6:16, 6:18, 7:16, 7:20, 9:1, 12:15, 12:21, 12:23, 12:25, 13:9, 14:22, 23:1, 24:17, 28:8, 28:9, 36:9, 36:10, 39:15, 39:18, 39:20, 39:23, 41:11, 43:2, 44:17, 46:4, 46:25, 51:11, 51:12, 51:18, 51:19, 51:22, 52:12, 52:20, 54:23, 56:25</p>	<p>applied [5] - 17:15, 17:17, 17:22, 17:23, 18:5</p> <p>applies [1] - 49:15</p> <p>apply [9] - 11:18, 17:21, 17:25, 25:20, 30:17, 33:9, 34:23, 53:1, 53:7</p> <p>applying [11] - 6:4, 9:5, 9:6, 9:18, 9:25, 11:17, 19:17, 33:24, 34:2, 34:24, 48:18</p> <p>appropriate [1] - 11:3</p> <p>approval [1] - 21:17</p> <p>argue [3] - 34:5, 42:9, 50:19</p> <p>argued [1] - 18:18</p> <p>arguing [6] - 5:12, 8:15, 11:17, 24:8, 24:9, 40:11</p> <p>argument [32] - 4:3, 5:10, 5:16, 6:13, 8:5, 11:16, 11:20, 13:23, 16:23, 17:7, 20:25, 21:3, 25:8, 25:21, 25:25, 31:22, 31:23, 33:16, 34:6, 34:18, 34:23, 35:6, 40:2, 40:11, 41:8, 42:8, 42:11, 42:12, 42:15, 45:6, 52:2, 58:18</p> <p>argument's [1] - 35:3</p> <p>arguments [8] - 11:19, 23:22, 24:14, 37:9, 55:4, 55:5, 55:13, 58:23</p> <p>art [5] - 24:21, 28:14, 29:12, 41:4, 52:13</p> <p>Article [1] - 16:2</p> <p>articulate [2] - 32:18, 32:19</p> <p>articulated [3] - 8:21, 43:24, 49:23</p> <p>articulating [1] - 52:24</p> <p>aside [4] - 15:17, 47:22, 48:7, 52:3</p> <p>assert [1] - 58:18</p> <p>asserted [1] - 28:14</p> <p>asserting [2] - 13:16, 47:21</p> <p>assertion [1] - 49:9</p> <p>associate [1] - 4:11</p> <p>assume [1] - 48:21</p> <p>assuming [2] - 18:4, 50:3</p> <p>assumptions [1] - 31:13</p> <p>Astra [28] - 9:18, 10:6, 10:11, 10:20, 12:1, 13:6, 18:22, 19:17, 20:11, 30:1, 30:6, 36:1, 36:5, 36:6, 36:14, 37:4, 38:8, 38:11, 39:18, 41:7, 45:25, 46:16, 47:2, 47:15, 49:19, 54:6, 54:7</p> <p>astray [1] - 41:18</p> <p>ASTRAZENECA [6] - 1:2, 1:7, 1:13</p> <p>AstraZeneca [32] - 4:9, 4:10, 5:13, 6:2, 7:24, 17:19, 18:7, 18:10, 21:6, 22:18, 22:24, 23:14, 31:13, 32:1, 32:4, 32:25, 33:3, 33:15, 34:6, 41:23, 42:8, 42:24, 44:23, 49:8, 50:11, 53:2, 56:4, 56:12, 57:8, 57:15, 59:13, 59:20</p> <p>Astrazeneca's [6] - 6:22, 15:18, 16:23, 18:17, 18:19, 24:1</p> <p>attention [1] - 10:17</p> <p>attorney [15] - 6:8, 10:2, 18:13, 18:19, 20:21, 27:3, 27:4, 47:22, 48:15, 49:10, 49:21, 49:23, 50:2, 50:4, 50:8</p> <p>attorney/client [19] - 18:20, 19:16, 20:7, 20:10, 23:9, 32:6, 33:4, 33:6, 33:7, 33:8, 33:14, 33:17, 34:22, 48:2, 48:4, 49:18, 50:19, 50:22, 53:6</p>	<p>ATTORNEYS [8] - 2:5, 2:9, 2:13, 2:16, 2:20, 2:23, 3:5, 3:8</p> <p>August [1] - 29:4</p> <p>authority [4] - 11:5, 13:19, 24:20, 25:2</p> <p>automatically [1] - 58:19</p> <p>available [1] - 51:21</p> <p>Avenue [1] - 2:8</p> <p>aware [1] - 19:25</p> <p>AZ's [1] - 15:9</p>
B		
<p>balancing [3] - 6:5, 9:11, 19:13</p> <p>ban [2] - 19:22, 20:1</p> <p>Barnes [1] - 60:2</p> <p>base [23] - 5:22, 6:16, 10:15, 12:9, 12:25, 13:3, 13:4, 13:9, 13:14, 17:14, 20:16, 20:20, 36:8, 38:13, 38:22, 39:2, 40:25, 46:6, 46:17, 46:21, 46:22, 47:1, 50:3</p> <p>based [5] - 11:22, 38:13, 40:12, 54:18, 57:20</p> <p>basic [4] - 5:19, 51:9, 51:16, 51:17</p> <p>basis [9] - 11:24, 16:21, 22:1, 23:9, 31:14, 39:11, 48:1, 48:14, 49:9</p> <p>bear [1] - 16:11</p> <p>bears [1] - 26:11</p> <p>become [1] - 41:11</p> <p>Bedford [1] - 2:15</p> <p>beg [1] - 11:9</p> <p>began [1] - 28:21</p> <p>begin [1] - 27:5</p> <p>beginning [2] - 42:18, 42:19</p> <p>behalf [1] - 5:12</p> <p>belief [1] - 38:15</p> <p>benefit [1] - 29:11</p> <p>best [1] - 61:13</p> <p>between [14] - 7:21, 9:7, 19:6, 25:5, 28:10, 28:12, 36:6, 39:18, 40:8, 41:15, 44:3, 46:4, 53:11, 54:22</p> <p>big [1] - 28:10</p> <p>blocking [2] - 34:8, 34:14</p> <p>blur [1] - 41:17</p> <p>borne [1] - 16:8</p> <p>bound [7] - 10:20, 11:7, 11:10, 11:12, 11:13, 11:18, 22:2</p> <p>breached [1] - 19:8</p> <p>Breath [4] - 5:3, 5:5, 59:24, 60:7</p> <p>BREATH [3] - 1:5, 3:5, 3:8</p> <p>brief [10] - 15:8, 15:16, 20:6, 21:19, 31:3, 39:17, 46:2, 60:12, 60:16, 60:18</p> <p>briefing [8] - 21:12, 21:13, 21:20, 29:16, 29:24, 30:9, 50:20</p> <p>briefly [1] - 50:16</p> <p>briefs [2] - 21:17, 60:15</p> <p>bring [1] - 10:17</p> <p>British [4] - 9:8, 9:10, 9:13, 46:9</p> <p>Broad [1] - 2:18</p> <p>Budesonide [6] - 6:22, 7:4, 7:5, 15:5,</p>		

<p>54:9, 54:10 burden [11] - 6:2, 17:17, 17:22, 17:24, 18:7, 18:8, 47:23, 48:12, 48:19, 48:20, 49:16 Burling [1] - 29:1 business [1] - 55:12 BY [8] - 2:3, 2:7, 2:11, 2:14, 2:18, 2:21, 3:3, 3:6 bypass [1] - 26:19</p>	<p>CHRISTINA [1] - 2:11 Christina [1] - 4:17 chronologically [1] - 8:7 circumstance [1] - 8:17 circumstances [2] - 34:11, 41:1 cited [11] - 7:18, 7:19, 9:23, 9:24, 12:17, 13:11, 31:5, 38:2, 39:4, 46:15, 46:18 cites [3] - 12:7, 16:17, 46:23 citizen [4] - 7:9, 8:23, 8:24, 15:1 citizens [1] - 8:22 Civil [2] - 48:9, 49:5 CIVIL [3] - 1:4, 1:10, 1:15 claim [1] - 41:12 claiming [1] - 46:11 claims [1] - 41:4 clarify [2] - 10:18, 38:16 clarity [1] - 57:3 clear [12] - 14:13, 14:18, 28:20, 29:5, 29:8, 32:17, 32:21, 39:16, 45:14, 47:15, 49:16, 57:25 clearly [9] - 12:22, 14:16, 20:2, 32:19, 32:20, 36:25, 49:25, 51:3, 56:9 CLERK [1] - 4:1 client [2] - 19:6, 37:25 clients [1] - 49:25 close [3] - 8:19, 55:4, 55:12 co [1] - 5:6 co-counsel [1] - 5:6 Colors [1] - 11:1 comity [1] - 9:5 comment [4] - 29:17, 36:23, 42:1, 54:6 comments [1] - 39:1 commit [1] - 22:4 communicating [1] - 15:1 communication [1] - 20:19 communications [16] - 9:21, 18:12, 24:9, 30:20, 30:22, 31:9, 31:14, 33:12, 34:19, 34:21, 35:2, 36:6, 39:18, 46:24, 52:10, 54:18 company [2] - 14:12, 52:10 compared [1] - 16:19 compel [4] - 18:19, 58:10, 58:11, 58:20 compelled [3] - 19:9, 19:24, 56:10 compelling [10] - 10:7, 18:25, 19:2, 19:3, 19:5, 19:15, 20:1, 20:21, 20:22, 49:22 compellingly [1] - 18:20 complete [3] - 21:12, 21:14, 21:20 completely [6] - 25:8, 26:13, 26:18, 28:3, 30:11, 60:16 complicated [1] - 28:6 complied [1] - 14:19 concerning [1] - 43:15 Concluded [1] - 60:22 conclusion [1] - 42:15 conclusions [2] - 47:6, 47:14 conduct [4] - 12:24, 13:4, 17:24, 18:9 conducted [1] - 52:14 conference [1] - 55:20</p>	<p>confidences [1] - 19:8 confidential [2] - 18:14, 54:16 conflict [3] - 9:6, 22:23, 34:12 conflicts [2] - 33:4, 33:14 confusion [1] - 51:8 conjunction [1] - 39:9 Connecticut [1] - 2:15 connection [11] - 4:4, 43:24, 45:17, 45:18, 52:4, 52:14, 52:16, 52:17, 53:7, 54:22 consider [6] - 12:8, 14:13, 17:10, 23:14, 53:12, 57:20 consideration [2] - 21:20, 57:7 considered [4] - 12:12, 18:13, 22:21, 30:10 considering [1] - 9:19 consistent [1] - 10:1 constitute [2] - 19:4, 56:10 constitutes [3] - 15:21, 43:18, 45:10 construction [1] - 41:12 context [3] - 13:8, 18:19, 54:21 continuation [3] - 26:19, 26:20, 51:11 continue [6] - 12:5, 17:7, 29:9, 56:23, 58:16, 58:18 CONTINUED [1] - 3:1 continues [2] - 45:20, 56:21 continuing [3] - 32:4, 51:19, 56:13 contrary [2] - 47:14, 47:18 COOPER [1] - 1:20 Cooperation [1] - 46:12 copy [4] - 16:11, 24:25, 27:2, 28:24 CORP [1] - 1:11 Corp [4] - 8:12, 10:2, 18:23, 49:19 correct [12] - 18:3, 21:25, 26:11, 27:20, 31:4, 35:18, 40:11, 42:5, 58:25, 60:5, 60:6, 60:7 cough [1] - 6:24 counsel [18] - 5:6, 23:10, 30:21, 30:22, 30:23, 31:2, 33:12, 34:24, 34:25, 36:7, 36:14, 37:10, 50:24, 51:3, 51:5, 56:23, 60:19 count [1] - 52:1 counterparts [2] - 10:13, 22:11 counties [1] - 41:24 countries [21] - 8:13, 8:16, 15:5, 25:10, 25:13, 25:14, 25:19, 26:2, 26:4, 26:7, 42:3, 42:6, 42:10, 50:21, 50:23, 52:1, 52:18, 52:22, 53:1, 53:3 country [11] - 14:25, 26:16, 31:7, 31:9, 31:11, 31:15, 39:9, 41:16, 41:21, 50:1, 52:23 country's [3] - 30:8, 53:5, 53:6 counts [3] - 28:16, 51:23, 51:25 couple [6] - 21:21, 22:7, 22:8, 33:19, 50:16, 50:18 course [3] - 8:14, 15:13, 49:4 Court [36] - 5:20, 5:25, 6:6, 9:4, 11:10, 11:12, 11:13, 11:17, 11:21, 17:9, 18:5, 18:9, 19:14, 22:2, 22:4, 25:7, 30:9,</p>
C		
<p>CAMDEN [1] - 1:20 camera [3] - 36:22, 36:23, 38:1 cannot [1] - 20:11 capitulated [1] - 24:11 capture [1] - 58:1 care [2] - 32:13, 60:10 carefully [1] - 47:8 Carnegie [1] - 2:11 case [85] - 4:4, 6:20, 7:18, 7:24, 8:20, 8:22, 8:24, 9:3, 9:14, 9:18, 9:22, 9:23, 10:10, 10:15, 10:17, 10:20, 10:22, 11:4, 12:1, 12:16, 12:18, 12:22, 13:1, 13:7, 13:21, 14:24, 22:1, 22:5, 22:15, 22:23, 23:2, 23:16, 24:1, 26:14, 27:7, 27:19, 29:14, 29:16, 29:19, 29:21, 29:22, 31:8, 31:13, 31:17, 31:21, 32:15, 36:1, 36:5, 36:11, 37:17, 37:20, 37:21, 38:3, 38:4, 38:5, 38:6, 38:7, 38:9, 38:16, 45:8, 45:12, 45:13, 45:20, 45:21, 46:1, 46:2, 47:2, 47:5, 47:9, 47:23, 49:4, 49:7, 49:18, 49:19, 50:25, 55:9, 55:23, 56:16, 57:8, 57:21 cases [28] - 8:12, 11:22, 12:6, 12:11, 12:12, 12:13, 12:24, 13:6, 13:10, 31:3, 31:4, 31:5, 31:8, 31:12, 31:19, 32:16, 34:14, 38:2, 39:3, 45:22, 45:24, 47:4, 47:7, 47:11, 47:15, 49:11 categories [1] - 16:12 categorizing [1] - 14:9 category [3] - 44:14, 44:17, 53:20 Center [3] - 2:3, 2:11, 3:3 certain [6] - 18:6, 23:8, 26:22, 30:7, 34:10, 41:1 certainly [7] - 15:15, 15:23, 22:13, 22:19, 34:11, 34:16, 58:1 CERTIFICATE [1] - 1:25 Certificate [1] - 61:16 Certified [1] - 61:11 certify [1] - 61:12 change [2] - 43:6, 50:4 changing [1] - 57:20 characterization [3] - 44:6, 44:12, 49:22 characterized [1] - 46:18 Cheryl [3] - 7:8, 54:11, 54:14 chicago [1] - 3:7 Chicago [1] - 5:7 Christer [1] - 42:25</p>		

<p>31:25, 32:3, 33:1, 33:20, 33:21, 35:11, 35:13, 35:15, 35:16, 35:20, 37:13, 37:15, 45:8, 49:24, 52:4, 56:24, 59:7, 61:10, 61:11</p> <p>court [30] - 8:21, 9:9, 9:11, 9:18, 9:20, 9:24, 10:3, 11:2, 12:19, 13:3, 18:22, 18:23, 19:17, 19:20, 19:24, 20:11, 21:17, 29:19, 29:22, 33:25, 34:1, 34:9, 34:13, 46:2, 46:5, 46:14, 46:16, 46:21</p> <p>COURT [112] - 1:1, 4:2, 4:13, 4:15, 4:20, 4:22, 5:2, 5:9, 5:12, 5:15, 6:13, 6:24, 7:2, 10:19, 11:7, 11:10, 11:15, 12:5, 13:15, 13:19, 14:1, 14:7, 15:8, 15:13, 16:22, 17:4, 17:6, 17:9, 19:10, 19:12, 20:23, 20:25, 21:3, 21:7, 23:19, 25:25, 26:5, 26:9, 27:7, 27:12, 27:15, 27:18, 28:20, 29:2, 29:5, 29:8, 30:2, 31:23, 33:16, 35:4, 35:6, 35:10, 35:13, 35:16, 35:21, 36:20, 37:8, 37:19, 37:24, 38:7, 38:17, 39:25, 40:2, 40:7, 40:10, 40:17, 40:21, 40:23, 41:19, 42:1, 42:7, 43:11, 43:14, 44:14, 44:17, 44:23, 45:1, 45:4, 45:6, 45:17, 47:3, 47:19, 47:21, 48:7, 48:21, 49:4, 49:7, 49:13, 50:13, 50:15, 51:13, 52:2, 53:8, 54:3, 54:24, 55:2, 55:4, 55:16, 55:22, 55:25, 56:22, 57:5, 58:2, 58:6, 58:8, 58:16, 59:1, 59:11, 59:18, 59:22, 59:25, 60:9</p> <p>Court's [3] - 10:19, 11:7, 11:18</p> <p>COURTHOUSE [1] - 1:19</p> <p>courts [10] - 9:17, 10:24, 12:8, 13:2, 17:22, 18:21, 20:2, 38:2, 39:4</p> <p>cover [1] - 28:7</p> <p>covered [1] - 32:6</p> <p>credence [1] - 6:9</p> <p>custody [1] - 21:15</p> <p>cut [1] - 9:5</p>	<p>38:14, 38:23, 55:6, 56:24</p> <p>decisions [4] - 10:25, 11:8, 11:11, 11:13</p> <p>declaration [9] - 10:11, 14:20, 18:11, 27:3, 29:1, 37:3, 42:25, 49:16, 49:17</p> <p>declarations [1] - 28:25</p> <p>declined [1] - 13:3</p> <p>DEFENDANT [6] - 2:13, 2:16, 2:20, 2:23, 3:5, 3:8</p> <p>defendant [4] - 4:18, 4:23, 5:5, 46:9</p> <p>Defendant [3] - 1:6, 1:12, 1:17</p> <p>defendants [2] - 4:16, 59:22</p> <p>Denise [2] - 4:10, 5:14</p> <p>DENISE [1] - 2:7</p> <p>deny [6] - 57:6, 58:10, 58:13, 58:20, 59:8</p> <p>denying [1] - 60:13</p> <p>DEPUTY [1] - 4:1</p> <p>describe [2] - 47:13, 47:16</p> <p>described [1] - 13:24</p> <p>describing [1] - 37:4</p> <p>description [1] - 40:13</p> <p>descriptions [1] - 39:16</p> <p>designate [3] - 8:3, 26:7, 43:14</p> <p>designated [17] - 14:12, 14:16, 14:20, 15:20, 24:19, 25:11, 25:18, 26:1, 26:2, 41:21, 42:2, 42:3, 42:6, 42:8, 42:17, 42:20, 53:24</p> <p>designates [2] - 25:13</p> <p>designating [4] - 16:1, 42:10, 43:18, 45:9</p> <p>designation [2] - 8:4, 15:19</p> <p>detail [1] - 24:24</p> <p>determine [1] - 37:9</p> <p>developed [2] - 15:4, 54:11</p> <p>developing [1] - 7:10</p> <p>development [2] - 6:22, 23:24</p> <p>difference [7] - 7:21, 28:10, 28:12, 28:13, 29:10, 40:21, 44:2</p> <p>different [14] - 8:17, 12:3, 22:16, 25:10, 26:18, 28:9, 30:11, 30:18, 30:24, 50:23, 51:2, 51:21, 52:18, 53:20</p> <p>directly [5] - 10:4, 10:13, 10:23, 11:6, 54:14</p> <p>disagree [1] - 39:1</p> <p>disclose [1] - 54:16</p> <p>disclosed [3] - 12:13, 19:9, 50:10</p> <p>disclosure [4] - 19:5, 20:4, 50:8, 56:10</p> <p>discourse [1] - 19:6</p> <p>discovered [1] - 45:8</p> <p>discovery [8] - 9:12, 9:22, 19:19, 29:19, 33:24, 34:3, 48:10, 48:24</p> <p>discuss [1] - 23:17</p> <p>discussed [1] - 29:15</p> <p>discussing [1] - 29:15</p> <p>discussion [2] - 12:20, 45:2</p> <p>discussions [3] - 8:11, 49:24, 54:17</p> <p>disingenuous [1] - 35:3</p> <p>dispute [7] - 15:9, 15:14, 16:22, 17:4, 17:5, 17:25, 20:15</p>	<p>dissolved [2] - 58:19</p> <p>distinction [5] - 7:17, 25:5, 41:15, 41:17, 53:11</p> <p>distinguish [1] - 40:7</p> <p>distinguishable [1] - 8:11</p> <p>distinguished [2] - 11:22, 16:18</p> <p>distinguishing [1] - 12:2</p> <p>District [6] - 23:4, 23:5, 23:6, 23:7, 61:11</p> <p>DISTRICT [2] - 1:1, 1:1</p> <p>district [6] - 10:23, 11:6, 12:8, 22:1, 59:12, 60:3</p> <p>districts [2] - 10:25, 11:5</p> <p>Docket [2] - 28:23, 29:1</p> <p>docket [2] - 45:4, 60:15</p> <p>document [5] - 24:10, 29:6, 37:25, 40:13, 45:1</p> <p>documented [1] - 29:2</p> <p>documents [98] - 7:14, 9:19, 10:9, 10:11, 12:14, 12:19, 17:13, 17:19, 18:1, 19:1, 19:4, 19:8, 20:13, 20:16, 20:20, 21:14, 21:21, 21:25, 22:9, 22:13, 22:14, 22:20, 22:23, 22:24, 23:1, 23:5, 23:8, 23:9, 23:13, 24:5, 27:18, 27:21, 27:24, 27:25, 28:1, 28:2, 29:20, 29:23, 30:1, 30:7, 30:11, 30:14, 30:18, 31:6, 31:7, 31:10, 32:6, 34:9, 34:10, 35:23, 35:24, 36:5, 36:13, 36:15, 36:18, 37:5, 37:13, 38:1, 38:12, 38:15, 38:18, 38:24, 39:5, 39:14, 39:21, 39:23, 40:3, 40:12, 40:14, 46:6, 46:10, 46:17, 46:21, 46:22, 47:13, 47:14, 47:16, 47:22, 48:1, 48:5, 48:10, 48:11, 50:2, 50:3, 50:5, 50:7, 56:15, 56:17, 57:12, 58:10, 58:11, 58:13, 58:20, 59:3, 59:8</p> <p>dominated [1] - 9:12</p> <p>done [4] - 24:21, 24:22, 25:9, 54:15</p> <p>DONIO [1] - 1:22</p> <p>doubt [1] - 41:22</p> <p>downplayed [1] - 19:20</p> <p>Dr [4] - 13:4, 18:11, 19:24, 60:2</p> <p>draft [10] - 12:14, 39:15, 39:17, 39:19, 53:11, 53:13, 53:15, 53:21, 53:22</p> <p>drafted [1] - 52:19</p> <p>draw [3] - 42:15, 47:6, 47:14</p> <p>dreams [1] - 46:16</p> <p>drug [1] - 15:4</p> <p>Duane [1] - 4:25</p> <p>DUANE [1] - 2:17</p> <p>dubious [1] - 34:17</p> <p>due [1] - 23:3</p>
D		
<p>damage [3] - 49:21, 50:11, 56:12</p> <p>data [2] - 16:13, 16:16</p> <p>date [22] - 14:17, 16:2, 16:5, 28:11, 28:12, 28:13, 28:16, 29:12, 43:7, 43:15, 44:3, 44:4, 44:5, 44:6, 44:12, 51:24, 51:25, 52:1, 57:13</p> <p>DATE [1] - 61:17</p> <p>dates [5] - 37:2, 41:13, 43:21, 51:10, 51:20</p> <p>David [2] - 4:19, 21:2</p> <p>DAVID [1] - 2:14</p> <p>days [2] - 21:21, 57:14</p> <p>deal [2] - 53:25, 60:1</p> <p>dealt [2] - 12:19, 30:9</p> <p>decide [2] - 38:18, 59:3</p> <p>decided [1] - 37:15</p> <p>deciding [1] - 5:21</p> <p>decision [16] - 10:3, 10:6, 12:4, 19:17, 22:23, 23:7, 30:1, 30:6, 37:23, 38:11,</p>		
E		
		<p>earliest [1] - 28:11</p> <p>easily [1] - 42:8</p> <p>effect [7] - 15:17, 16:2, 16:6, 43:9, 43:15, 46:20, 49:11</p>

<p>effective [4] - 28:11, 44:4, 44:5, 44:12 Eisai [1] - 13:4 either [11] - 11:8, 11:11, 11:14, 23:10, 24:24, 39:23, 44:13, 45:23, 57:6, 58:9, 58:17 Elkin [3] - 7:8, 54:12, 54:15 Elkins [1] - 7:15 employee [2] - 37:4 employees [1] - 36:6 en [1] - 60:11 encourage [1] - 49:24 end [10] - 22:22, 23:12, 23:15, 29:18, 29:21, 29:23, 43:23, 49:14, 55:13, 60:17 English [1] - 4:8 ENGLISH [1] - 2:2 enter [2] - 26:15, 60:16 entering [3] - 26:21, 26:25, 27:8 entitled [1] - 9:9 entries [1] - 22:8 erred [2] - 11:17, 39:13 erroneous [1] - 11:23 error [1] - 22:4 Escanlar [1] - 5:5 ESCANLAR [2] - 3:3, 5:4 especially [1] - 7:23 ESQUIRE [9] - 2:3, 2:7, 2:11, 2:14, 2:18, 2:21, 3:3, 3:6 essentially [1] - 29:10 established [1] - 56:9 European [2] - 7:15, 50:9 evidence [7] - 18:6, 35:19, 35:21, 35:22, 37:16, 38:3, 38:4 eviscerates [1] - 48:18 exact [1] - 22:10 exactly [2] - 36:4, 40:23 examples [1] - 54:14 exception [1] - 31:11 excluding [1] - 34:21 excuse [1] - 11:2 excused [1] - 49:8 expectations [1] - 30:25 expected [1] - 36:11 expecting [1] - 53:3 expedited [1] - 59:9 experts [1] - 60:1 explained [3] - 33:5, 33:22, 52:16 explanation [1] - 26:12 explicitly [3] - 21:17, 31:4, 31:5 expressed [1] - 51:3 extend [1] - 55:14 extended [6] - 50:24, 51:3, 51:4, 55:11, 56:20, 57:4 extending [1] - 56:4 extent [1] - 24:17 extraordinarily [1] - 18:14 extremely [1] - 30:14</p>	<p style="text-align: center;">F</p> <p>face [15] - 13:24, 16:9, 16:13, 16:15, 16:18, 22:16, 23:16, 28:17, 28:21, 36:2, 36:4, 44:22, 51:8, 51:9, 51:16 facilities [1] - 54:8 facility [1] - 54:13 fact [30] - 6:7, 6:19, 8:2, 8:9, 8:24, 9:15, 9:17, 10:24, 12:1, 12:14, 12:16, 14:13, 14:25, 15:19, 16:8, 18:14, 18:18, 19:3, 19:21, 19:23, 20:19, 23:23, 32:4, 39:8, 42:16, 43:5, 43:6, 46:7, 50:2, 53:4 factor [1] - 33:1 facts [8] - 6:1, 14:23, 18:6, 42:16, 43:25, 45:16, 46:3, 52:5 factual [4] - 5:21, 11:21, 18:9, 39:3 fallacy [1] - 25:20 falls [1] - 53:5 family [1] - 51:10 far [4] - 13:10, 19:25, 28:13, 31:3 favor [1] - 9:6 FDA [1] - 7:4 Federal [3] - 48:9, 48:10, 49:5 federal [2] - 32:10, 47:25 fellow [1] - 15:2 felt [1] - 9:11 few [1] - 21:24 fifth [2] - 32:25, 33:1 file [12] - 16:5, 24:20, 26:20, 27:3, 41:12, 42:18, 44:9, 44:10, 47:23, 52:21, 53:3, 60:14 filed [32] - 4:4, 7:22, 8:5, 8:10, 14:14, 14:15, 14:16, 14:23, 15:22, 15:24, 16:3, 16:24, 17:1, 24:18, 25:2, 25:17, 26:13, 27:10, 29:3, 34:1, 35:18, 41:24, 42:5, 43:3, 43:5, 43:8, 44:9, 52:13, 52:15, 53:2, 53:23 filings [45] - 7:24, 8:6, 14:18, 15:18, 16:2, 16:5, 21:5, 21:8, 22:2, 24:16, 25:12, 26:13, 26:18, 27:1, 28:11, 28:12, 28:16, 29:12, 35:11, 35:14, 35:17, 37:3, 37:12, 38:25, 39:14, 39:22, 40:4, 40:14, 40:16, 40:17, 41:7, 42:21, 43:7, 43:11, 43:15, 43:20, 49:2, 51:24, 51:25, 52:1, 52:20, 59:6, 60:11, 60:16 filings [7] - 22:19, 23:22, 24:6, 26:25, 28:3, 28:6, 31:21 Finally [1] - 46:8 finally [1] - 22:22 fine [1] - 59:17 firms [1] - 36:14 first [16] - 5:20, 6:14, 6:19, 12:12, 21:4, 21:5, 21:10, 23:21, 23:23, 31:25, 33:7, 33:20, 34:7, 35:8, 39:2, 52:11 five [1] - 31:4 Flaherty [1] - 4:8 FLAHERTY [2] - 2:3, 4:7 Floor [1] - 3:3 flow [1] - 54:14</p>	<p>focus [2] - 8:14, 52:4 focusing [2] - 44:5, 44:6 folks [1] - 41:7 followed [1] - 22:4 following [2] - 6:18, 43:17 FOR [9] - 1:1, 2:5, 2:9, 2:13, 2:16, 2:20, 2:23, 3:5, 3:8 foregoing [1] - 61:12 foreign [32] - 7:19, 7:20, 8:13, 8:14, 8:15, 8:16, 9:5, 9:18, 9:25, 10:12, 12:8, 12:15, 12:22, 12:25, 13:8, 14:22, 16:10, 16:12, 16:20, 22:11, 24:10, 24:14, 28:3, 31:6, 31:15, 32:11, 41:16, 44:7, 44:13, 44:18, 46:25, 49:20 forget [1] - 22:10 form [2] - 7:6, 27:2 former [1] - 37:4 forth [2] - 15:1, 61:13 four [1] - 2:3 fourth [1] - 33:1 frank [2] - 19:6, 49:24 frankly [1] - 31:18 free [5] - 9:12, 9:22, 19:19, 34:11, 34:16 front [1] - 41:25 future [1] - 52:23</p> <p style="text-align: center;">G</p> <p>game [1] - 21:19 Gateway [2] - 2:3, 3:3 gather [1] - 36:15 general [2] - 40:12, 48:23 generally [2] - 48:23, 60:17 generated [1] - 39:5 German [3] - 12:20, 25:24, 42:9 GERRY [1] - 1:19 GILMAN [1] - 2:21 Golden [7] - 8:12, 9:23, 12:16, 18:22, 47:5, 47:9, 49:19 governed [6] - 7:20, 34:1, 47:25, 48:8, 48:22, 49:4 governs [1] - 33:13 grant [7] - 56:23, 57:11, 57:19, 58:5, 58:9, 58:12, 59:1 granted [2] - 35:13, 35:17 Gray [3] - 4:10, 4:11, 4:12 GRAY [1] - 2:6 grounds [1] - 5:19 guess [6] - 13:22, 31:25, 32:23, 32:25, 44:9, 55:17</p> <p style="text-align: center;">H</p> <p>hairs [1] - 53:19 half [2] - 32:23, 33:7 hand [2] - 37:11, 38:19 handling [1] - 60:13 hard [1] - 48:3</p>
--	--	---

<p>harm [14] - 17:18, 18:2, 19:7, 32:1, 32:14, 32:15, 32:17, 32:18, 32:21, 47:18, 50:8, 50:11, 56:4</p> <p>head [1] - 42:18</p> <p>heading [1] - 16:16</p> <p>hear [4] - 5:16, 6:11, 6:13, 21:3</p> <p>hearing [3] - 21:21, 55:20, 60:3</p> <p>HEINZ [1] - 3:6</p> <p>Heinz [1] - 5:6</p> <p>held [2] - 12:3, 31:25</p> <p>HENDLER [10] - 2:7, 55:10, 57:2, 57:24, 58:4, 58:7, 58:14, 59:17, 59:20, 60:5</p> <p>Hendler [1] - 4:11</p> <p>hereby [1] - 61:12</p> <p>hereinbefore [1] - 61:13</p> <p>higher [2] - 17:22, 18:4</p> <p>highly [1] - 42:24</p> <p>Hill [1] - 4:17</p> <p>HILL [1] - 2:10</p> <p>historical [1] - 51:17</p> <p>history [2] - 41:12, 51:10</p> <p>hold [1] - 50:21</p> <p>holding [1] - 46:19</p> <p>holdings [1] - 47:15</p> <p>holds [1] - 13:22</p> <p>honest [2] - 45:13, 45:21</p> <p>Honor [130] - 4:7, 4:18, 4:21, 5:1, 5:4, 5:8, 5:11, 5:14, 5:17, 5:18, 6:11, 7:1, 7:17, 7:18, 8:5, 8:19, 9:3, 9:14, 9:24, 10:5, 10:7, 10:16, 10:21, 10:25, 11:2, 11:12, 11:20, 11:25, 12:3, 12:10, 12:17, 13:6, 13:12, 13:18, 13:21, 14:5, 14:6, 15:12, 15:24, 16:12, 16:21, 17:2, 17:11, 17:13, 17:15, 17:17, 17:20, 17:23, 18:8, 18:18, 18:21, 18:24, 19:2, 19:14, 20:5, 20:24, 21:2, 21:4, 21:24, 23:17, 23:20, 24:12, 24:25, 28:24, 29:7, 31:20, 31:24, 32:7, 33:5, 35:5, 35:7, 35:12, 35:18, 36:3, 36:11, 36:12, 36:19, 36:21, 37:6, 37:18, 37:22, 38:10, 38:14, 38:16, 38:21, 39:10, 40:20, 41:18, 43:22, 44:4, 44:16, 45:5, 45:12, 45:15, 46:1, 47:7, 47:14, 48:3, 48:17, 49:12, 50:14, 50:17, 52:7, 52:16, 53:10, 54:1, 54:5, 55:1, 55:3, 55:10, 55:11, 55:15, 55:18, 55:21, 56:1, 56:3, 56:6, 56:19, 57:2, 57:3, 57:4, 58:14, 58:25, 59:5, 59:17, 59:21, 59:23, 59:24, 60:6, 60:7</p> <p>Honor's [5] - 5:19, 10:17, 12:1, 33:5, 35:25</p> <p>hope [1] - 55:6</p> <p>hoping [1] - 47:25</p> <p>house [15] - 20:8, 20:10, 30:19, 30:22, 30:23, 31:2, 33:12, 34:25, 35:1, 36:7, 39:19, 50:24, 51:3, 51:5</p> <p>Hubbard [1] - 3:7</p>	<p style="text-align: center;">I</p> <p>i.e [1] - 16:20</p> <p>idea [2] - 22:12, 45:22</p> <p>identified [3] - 32:20, 44:21, 44:23</p> <p>identifies [2] - 16:9, 16:14</p> <p>identify [1] - 19:2</p> <p>Illinois [1] - 3:7</p> <p>immediate [1] - 57:14</p> <p>implicated [1] - 39:7</p> <p>implied [1] - 36:24</p> <p>imply [1] - 41:23</p> <p>implying [1] - 22:25</p> <p>importance [2] - 49:18, 49:22</p> <p>important [7] - 14:5, 14:8, 14:10, 18:14, 18:21, 42:24, 43:25</p> <p>improper [3] - 11:3, 21:10, 21:22</p> <p>improperly [1] - 33:2</p> <p>in-house [15] - 20:8, 20:10, 30:19, 30:22, 30:23, 31:2, 33:12, 34:25, 35:1, 36:7, 39:19, 50:24, 51:3, 51:5</p> <p>INC [2] - 1:11, 1:16</p> <p>incidental [2] - 5:23, 52:17</p> <p>incidentally [1] - 24:7</p> <p>inclined [1] - 55:14</p> <p>include [2] - 37:13, 59:9</p> <p>included [1] - 51:9</p> <p>including [2] - 18:10, 54:8</p> <p>incorrect [1] - 56:15</p> <p>indeed [4] - 6:17, 10:12, 13:1, 18:7</p> <p>indefinitely [3] - 56:13, 56:20, 58:24</p> <p>independent [1] - 25:22</p> <p>indicate [2] - 18:6, 42:22</p> <p>indicated [1] - 27:13</p> <p>indicates [1] - 17:3</p> <p>indication [2] - 14:18, 22:15</p> <p>individual [1] - 10:11</p> <p>influence [3] - 30:23, 31:2, 51:6</p> <p>inform [1] - 37:15</p> <p>information [7] - 11:25, 18:15, 19:25, 51:9, 51:17, 51:18, 51:20</p> <p>infringes [1] - 24:3</p> <p>injured [1] - 19:5</p> <p>injuries [1] - 18:17</p> <p>injury [1] - 6:2</p> <p>input [3] - 7:13, 7:15, 54:19</p> <p>inquiry [3] - 6:19, 38:22, 39:3</p> <p>inspection [2] - 36:22, 36:23</p> <p>instance [1] - 30:11</p> <p>intents [2] - 26:22, 26:24</p> <p>interest [36] - 5:23, 6:5, 6:6, 6:8, 6:17, 8:21, 9:12, 9:13, 9:15, 9:16, 9:21, 9:22, 9:24, 9:25, 10:1, 15:3, 19:15, 19:18, 19:19, 19:20, 20:3, 20:22, 29:18, 29:23, 29:24, 33:13, 33:23, 33:25, 34:2, 34:4, 34:5, 34:19, 35:1, 39:7, 41:10, 42:22</p> <p>interests [3] - 9:12, 19:6, 33:23</p>	<p>international [20] - 15:21, 15:23, 15:25, 16:2, 24:20, 25:12, 27:9, 42:1, 43:12, 43:13, 43:15, 43:17, 44:15, 44:19, 44:21, 45:9, 45:10, 46:12, 52:13, 53:23</p> <p>interpretation [1] - 21:25</p> <p>intimately [1] - 7:10</p> <p>invention [12] - 6:21, 6:23, 7:3, 7:6, 7:12, 8:25, 14:24, 15:6, 39:8, 39:12, 42:19, 54:23</p> <p>inventor [6] - 7:9, 8:23, 39:9, 52:5, 54:7, 54:12</p> <p>inventors [9] - 8:8, 14:25, 15:2, 27:6, 39:10, 39:19, 50:9, 52:8, 52:11</p> <p>inventorship [1] - 46:8</p> <p>invoke [1] - 30:12</p> <p>involve [1] - 10:14</p> <p>involved [7] - 7:10, 8:24, 15:2, 20:16, 39:6, 41:2, 41:10</p> <p>involvement [1] - 8:21</p> <p>involving [1] - 46:24</p> <p>irrelevant [1] - 44:4</p> <p>isolated [2] - 29:16, 45:21</p> <p>Israeli [1] - 12:20</p> <p>issue [26] - 9:19, 10:10, 10:23, 12:14, 14:11, 17:13, 22:17, 23:21, 27:9, 27:19, 31:10, 36:23, 38:24, 45:24, 46:6, 46:10, 46:22, 47:13, 47:16, 47:23, 48:4, 48:12, 50:25, 55:6, 56:21, 60:2</p> <p>issued [1] - 55:15</p> <p>issues [6] - 5:21, 6:1, 9:5, 33:21, 41:2, 56:2</p> <p>Italian [3] - 12:18, 12:21</p> <p>itself [3] - 13:3, 14:1, 24:15</p> <p style="text-align: center;">J</p> <p>James [3] - 14:20, 41:6, 42:18</p> <p>Japan [1] - 26:16</p> <p>Japanese [2] - 25:23, 42:9</p> <p>Jersey [8] - 2:4, 2:12, 2:19, 3:4, 10:24, 11:14, 61:11, 61:12</p> <p>JERSEY [2] - 1:1, 1:20</p> <p>John [1] - 4:8</p> <p>JOHN [2] - 1:19, 2:3</p> <p>JOHNSTON [1] - 2:14</p> <p>Johnston [1] - 4:19</p> <p>Jones [2] - 36:4, 38:12</p> <p>judge [5] - 10:15, 11:4, 37:15, 59:12, 60:3</p> <p>JUDGE [1] - 1:23</p> <p>Judge [3] - 11:2, 36:4, 38:11</p> <p>judicially [1] - 56:10</p> <p>Judy [1] - 4:9</p> <p>June [1] - 61:17</p>
--	--	---

<div>K</div> <div>KAPLAN^[1] - 2:21 Katherine^[1] - 5:5 KATHERINE^[1] - 3:3 keep^[4] - 6:25, 28:7, 30:3, 44:15 keeps^[2] - 51:21, 52:18 key^[2] - 5:21, 6:1 Korean^[10] - 9:19, 9:20, 19:17, 30:1, 30:7, 30:10, 30:11, 30:13, 30:16</div>	<div>live^[1] - 54:13 lives^[1] - 7:9 LLC^[2] - 3:2, 5:5 locate^[1] - 10:9 log^[11] - 7:13, 7:14, 10:10, 22:8, 27:21, 27:25, 37:2, 39:17, 40:12, 48:5, 54:20 logs^[1] - 36:20 look^[20] - 7:12, 12:16, 16:10, 20:5, 20:12, 20:18, 22:6, 23:13, 25:1, 30:8, 30:15, 33:9, 37:5, 37:16, 38:18, 39:3, 39:4, 42:13, 42:16 looked^[4] - 35:24, 56:1, 56:8, 60:9 looking^[4] - 10:24, 31:6, 33:13, 37:2 Loring^[16] - 4:10, 5:14, 5:15, 23:21, 23:22, 25:5, 28:21, 29:15, 29:25, 30:6, 31:12, 50:18, 51:21, 52:18, 53:10, 54:4 LORING^[69] - 2:7, 4:14, 5:11, 5:14, 5:17, 6:14, 7:1, 7:3, 10:21, 11:9, 11:12, 11:20, 12:6, 13:18, 13:21, 14:5, 14:8, 15:12, 15:23, 17:1, 17:5, 17:8, 17:11, 19:11, 19:13, 20:24, 24:12, 28:24, 29:3, 35:7, 35:12, 35:15, 35:18, 35:22, 36:21, 37:18, 37:21, 38:6, 38:8, 38:21, 40:1, 40:3, 40:9, 40:16, 40:20, 40:22, 40:24, 41:22, 42:13, 43:13, 43:22, 44:16, 44:20, 44:24, 45:3, 45:5, 45:12, 45:18, 47:4, 47:20, 48:3, 48:14, 49:1, 49:6, 49:11, 49:14, 50:14, 54:5, 55:3 Loring's^[2] - 33:16, 52:2 lost^[2] - 24:8, 36:15 louder^[1] - 51:14 LP^[3] - 1:2, 1:7, 1:13 LYNN^[1] - 2:11</div>	<div>meantime^[1] - 56:18 meet^[5] - 11:16, 18:7, 18:8, 32:10, 32:12 meeting^[1] - 8:2 meets^[1] - 41:3 mention^[1] - 53:9 mentioned^[5] - 14:14, 23:23, 32:7, 32:8, 50:18 met^[2] - 6:2, 49:15 methods^[1] - 7:8 microphone^[1] - 30:3 might^[5] - 26:23, 35:20, 41:1, 42:15, 52:23 mind^[8] - 8:9, 37:6, 41:6, 41:10, 52:20, 52:21, 52:22, 57:20 minute^[2] - 21:5, 33:10 minutes^[1] - 21:24 misread^[1] - 23:5 miss^[1] - 32:4 Molino^[1] - 5:7 MOLINO^[1] - 3:6 moment^[3] - 14:14, 16:12, 38:10 MONDAY^[1] - 1:21 MORRIS^[1] - 2:17 Morris^[1] - 4:25 most^[4] - 13:22, 15:15, 55:23, 55:24 motion^[28] - 4:4, 15:11, 17:7, 18:19, 21:13, 21:16, 21:20, 21:22, 22:2, 22:5, 32:5, 35:24, 36:2, 36:17, 47:24, 48:13, 48:16, 49:2, 57:6, 57:7, 57:9, 57:11, 57:19, 58:9, 58:11, 58:12, 59:8 motions^[3] - 60:2, 60:4, 60:14 move^[7] - 13:12, 23:18, 23:19, 27:15, 31:21, 31:23, 32:9 moved^[1] - 36:14 moving^[2] - 18:4, 45:20 MR^[51] - 4:7, 4:21, 5:1, 5:8, 21:2, 21:4, 21:9, 23:20, 24:13, 26:3, 26:6, 26:10, 27:11, 27:14, 27:16, 27:20, 29:7, 29:10, 30:5, 31:24, 33:19, 35:5, 42:5, 42:12, 50:16, 51:15, 52:7, 53:9, 55:1, 55:10, 55:17, 55:24, 56:1, 57:2, 57:3, 57:24, 58:4, 58:7, 58:14, 58:25, 59:5, 59:16, 59:17, 59:20, 59:21, 59:23, 59:24, 60:5, 60:6, 60:7, 60:8 MS^[71] - 4:14, 4:17, 4:24, 5:4, 5:11, 5:14, 5:17, 6:14, 7:1, 7:3, 10:21, 11:9, 11:12, 11:20, 12:6, 13:18, 13:21, 14:5, 14:8, 15:12, 15:23, 17:1, 17:5, 17:8, 17:11, 19:11, 19:13, 20:24, 24:12, 28:24, 29:3, 35:7, 35:12, 35:15, 35:18, 35:22, 36:21, 37:18, 37:21, 38:6, 38:8, 38:21, 40:1, 40:3, 40:9, 40:16, 40:20, 40:22, 40:24, 41:22, 42:13, 43:13, 43:22, 44:16, 44:20, 44:24, 45:3, 45:5, 45:12, 45:18, 47:4, 47:20, 48:3, 48:14, 49:1, 49:6, 49:11, 49:14, 50:14, 54:5, 55:3 Mulberry^[1] - 2:4 multi^[1] - 51:11</div>
<div>L</div> <div>L'arrivee^[3] - 7:8, 54:12, 54:15 L'arrivee-Elkin^[3] - 7:8, 54:12, 54:15 language^[3] - 14:2, 22:10, 43:20 largest^[1] - 42:23 last^[4] - 10:8, 21:5, 35:9, 55:19 late^[3] - 21:11, 21:19, 37:12 law^[81] - 6:3, 6:7, 6:9, 7:18, 7:20, 8:1, 8:14, 8:16, 9:5, 9:6, 9:7, 9:8, 9:10, 9:18, 9:20, 9:25, 11:17, 12:20, 12:21, 13:13, 13:21, 14:19, 17:13, 17:15, 17:16, 17:24, 19:1, 19:18, 19:22, 20:2, 20:6, 20:12, 22:3, 22:4, 23:16, 25:19, 29:15, 30:12, 30:13, 30:16, 30:19, 31:21, 32:11, 32:24, 33:4, 33:6, 33:7, 33:8, 33:9, 33:10, 33:14, 34:8, 34:13, 34:20, 34:22, 34:23, 34:25, 35:2, 41:2, 41:4, 41:5, 41:10, 45:8, 47:17, 47:21, 48:19, 48:23, 49:2, 49:7, 49:18, 49:20, 50:7, 50:25, 51:1, 53:1, 53:6 laws^[2] - 26:11, 30:8 lawyer^[2] - 19:7, 50:9 lawyers^[6] - 8:8, 10:14, 20:8, 20:10, 39:19, 49:24 leads^[1] - 57:12 least^[4] - 14:24, 39:8, 55:13, 60:12 leave^[4] - 35:10, 35:13, 35:16, 37:13 led^[3] - 6:21, 9:1, 41:18 legal^[7] - 5:21, 6:1, 8:9, 11:21, 18:10, 18:13, 39:6 less^[1] - 29:13 lesson^[1] - 47:6 letter^[8] - 10:8, 21:18, 35:8, 35:19, 37:12, 46:13, 46:17, 50:20 liberal^[1] - 33:24 liberally^[1] - 34:3 lift^[1] - 56:19 light^[2] - 20:13, 41:4 LIMITED^[3] - 1:5, 3:5, 3:8 Limited^[1] - 5:3 lines^[1] - 59:15 LISA^[3] - 1:24, 61:10, 61:15 listed^[2] - 28:18, 48:4 lists^[1] - 51:23 litigation^[5] - 34:1, 36:10, 37:14, 47:24, 48:8</div>	<div>M</div> <div>magistrate^[1] - 11:4 MAGISTRATE^[1] - 1:23 maintained^[1] - 23:8 manufactured^[1] - 54:10 manufacturing^[1] - 54:11 MARCUS^[3] - 1:24, 61:10, 61:15 MARIE^[1] - 1:22 market^[4] - 15:4, 15:5, 42:20, 42:23 Markman^[1] - 60:2 Massachusetts^[2] - 7:9, 54:9 masse^[1] - 60:11 matter^[8] - 18:12, 31:17, 32:13, 37:14, 43:23, 53:12, 61:13 MAY^[1] - 1:21 MAZZOCHI^[1] - 3:6 Mazzochi^[1] - 5:7 McCarter^[2] - 2:2, 4:8 mean^[9] - 16:7, 22:24, 30:20, 31:7, 37:19, 40:7, 52:15, 53:12, 55:23 means^[1] - 22:15 meant^[2] - 32:3, 41:23</div>	

multiple [1] - 51:19 must [1] - 8:1	45:24, 45:25, 46:16, 46:18, 46:23, 47:15 OF [1] - 1:1 offer [2] - 36:21, 36:22 office [21] - 14:3, 16:25, 17:1, 17:3, 24:19, 24:22, 25:3, 26:14, 26:15, 27:10, 43:1, 43:3, 43:4, 43:9, 44:25, 53:14, 53:15, 53:16, 53:18, 53:24 Office [2] - 16:4, 46:14 offices [1] - 8:15 OFFICIAL [1] - 1:25 Official [2] - 61:10, 61:15 often [1] - 7:19 once [3] - 7:22, 56:5, 59:3 One [1] - 3:3 one [29] - 11:18, 16:12, 21:25, 24:18, 26:19, 26:23, 28:5, 28:7, 28:25, 29:21, 29:22, 30:13, 30:17, 31:11, 31:25, 44:1, 45:22, 45:24, 47:19, 50:25, 51:22, 52:8, 54:5, 55:18, 55:21, 55:22, 55:24, 58:2, 60:3 ONE [1] - 1:19 ones [1] - 59:25 ONGE [1] - 2:14 Onge [1] - 4:19 opinion [3] - 37:16, 50:23, 51:2 Opinion [3] - 32:2, 32:3, 55:6 oppose [2] - 57:10, 57:17 opposed [4] - 5:24, 15:21, 43:6, 47:10 opposition [3] - 15:14, 15:16, 35:23 optimistic [1] - 59:7 option [1] - 57:18 Order [14] - 5:19, 18:7, 32:8, 33:5, 33:20, 33:22, 35:25, 55:12, 57:7, 57:16, 57:21, 58:17, 60:10, 60:16 order [17] - 17:18, 18:16, 27:4, 32:5, 32:9, 34:10, 42:14, 47:24, 48:13, 48:16, 48:18, 48:20, 48:25, 49:3, 50:1, 57:19, 58:6 ordering [2] - 34:13, 60:14 original [1] - 61:12 otherwise [1] - 48:1 ought [1] - 17:25 ourselves [1] - 50:20 outlier [1] - 45:21 outside [3] - 7:5, 30:21, 34:24 outweighed [3] - 9:21, 19:19, 33:23 overlooked [9] - 5:21, 6:1, 6:7, 9:4, 11:21, 12:10, 18:6, 19:14, 19:23 overturned [1] - 56:5 own [4] - 12:17, 21:15, 21:21, 25:22	pages [1] - 29:3 papers [1] - 6:20 paperwork [1] - 27:2 paraphrasing [1] - 25:7 pardon [1] - 11:9 part [8] - 6:21, 39:8, 41:11, 42:17, 43:16, 53:18, 54:18, 60:13 partially [1] - 14:24 particular [8] - 26:16, 31:9, 31:11, 31:15, 47:9, 52:23, 53:5, 57:19 parties [4] - 24:23, 39:4, 56:25, 57:22 parties' [1] - 58:17 parts [1] - 33:3 party [3] - 24:24, 45:23, 48:13 passing [1] - 45:15 patent [69] - 6:15, 6:21, 7:10, 7:15, 8:15, 8:17, 8:25, 9:8, 9:10, 9:13, 10:1, 10:13, 10:14, 13:24, 16:3, 16:8, 16:11, 16:14, 16:15, 16:19, 23:25, 24:2, 24:3, 24:19, 24:22, 25:3, 27:10, 27:22, 28:6, 28:8, 28:16, 28:22, 31:10, 31:15, 31:16, 38:24, 38:25, 39:12, 39:15, 39:17, 39:19, 40:18, 41:3, 41:5, 42:9, 43:2, 44:22, 44:24, 45:3, 46:9, 46:11, 46:13, 50:9, 51:8, 51:9, 51:16, 51:17, 51:18, 52:8, 53:13, 53:14, 53:18, 53:23, 53:24, 54:14, 54:17, 54:23 Patent [3] - 16:4, 46:12, 46:14 patentability [1] - 8:16 patents [8] - 5:22, 8:2, 24:2, 24:6, 27:22, 28:18, 46:24, 46:25 PCT [75] - 8:3, 8:4, 10:12, 12:15, 12:25, 13:16, 13:23, 14:3, 14:9, 14:11, 14:21, 15:9, 15:14, 15:19, 15:20, 15:22, 15:24, 16:3, 16:6, 16:9, 16:17, 16:23, 17:2, 22:11, 23:1, 23:22, 24:7, 24:15, 24:16, 24:20, 24:24, 25:12, 25:16, 25:21, 26:1, 26:5, 26:6, 26:9, 26:10, 26:11, 26:13, 26:20, 26:21, 27:1, 27:2, 27:9, 28:3, 28:15, 28:16, 29:11, 31:20, 37:3, 39:21, 40:5, 40:18, 41:9, 41:20, 41:24, 42:13, 42:20, 43:3, 44:8, 44:20, 45:19, 46:12, 50:6, 51:23, 52:3, 52:12 PCT's [1] - 22:18 PCT/SE [1] - 17:3 Peel [4] - 14:20, 15:1, 41:6, 42:18 pending [3] - 56:23, 57:16, 59:1 perform [1] - 13:2 performed [1] - 34:15 PERGAMENT [1] - 2:21 period [2] - 30:18, 57:7 permanent [1] - 56:12 permit [2] - 35:13, 35:17 permitted [2] - 20:3, 35:11 person [1] - 39:6 personnel [1] - 8:8 persuasive [3] - 11:5, 13:10, 13:23 pharmaceutical [1] - 42:23 philosophy [1] - 30:24 phone [1] - 56:6
N		
N.J [1] - 61:16 name [1] - 4:7 named [1] - 8:23 national [5] - 16:3, 26:15, 26:21, 26:25, 27:8 nature [3] - 20:18, 40:13, 50:5 necessary [1] - 37:10 need [16] - 14:19, 18:24, 20:18, 25:23, 27:4, 27:5, 30:17, 32:4, 32:12, 32:16, 38:19, 42:16, 48:24, 55:8, 56:25, 59:18 never [4] - 19:24, 20:3, 27:23, 50:9 NEW [2] - 1:1, 1:20 new [10] - 11:25, 26:18, 27:1, 27:2, 27:3, 27:4, 35:19, 35:21, 35:22 New [15] - 2:4, 2:8, 2:12, 2:19, 3:4, 10:24, 11:14, 22:15, 23:4, 23:5, 23:6, 23:7, 61:11, 61:12 Newark [3] - 2:4, 2:19, 3:4 nice [1] - 60:20 NJ [1] - 2:22 NO [3] - 1:5, 1:10, 1:16 none [4] - 11:14, 12:12, 12:13, 22:12 nonsense [1] - 46:5 nonsterile [1] - 7:6 North [1] - 2:22 Norwegian [1] - 12:20 Notary [1] - 61:11 note [2] - 58:21, 58:22 notes [1] - 61:12 nothing [9] - 11:6, 20:24, 44:11, 45:25, 55:1, 57:21, 59:20, 59:21, 59:24 Nothing [1] - 59:23 notion [2] - 43:1, 49:23 Number [2] - 28:23, 29:1 number [8] - 4:5, 12:10, 16:13, 16:15, 17:3, 42:3, 45:4, 51:10 numerous [1] - 28:22		
O		
object [3] - 21:9, 55:17, 58:22 objection [1] - 55:16 objections [1] - 37:8 objects [1] - 60:3 obligation [1] - 32:9 obtain [1] - 37:24 obviously [2] - 22:17, 48:9 occur [1] - 32:15 occurred [1] - 8:6 odd [2] - 25:19, 34:22 Odone [19] - 8:20, 9:3, 9:9, 10:3, 10:20, 12:2, 12:3, 13:7, 29:16, 33:25, 45:20,		
	P	
	Pablo [1] - 4:10 PABLO [1] - 2:7 page [3] - 28:7, 28:21, 29:3 Page [7] - 15:10, 15:15, 19:16, 29:2, 36:2, 46:2, 47:1	

<p>place [5] - 24:4, 25:3, 25:4, 48:20, 52:11 plain [1] - 38:14 PLAINTIFF [2] - 2:5, 2:9 plaintiffs [1] - 4:9 Plaintiffs [3] - 1:4, 1:9, 1:14 play [1] - 57:5 playing [1] - 57:22 PLAZA [1] - 1:19 Pluta [1] - 4:25 PLUTA [4] - 2:21, 5:1, 59:23, 60:8 point [25] - 5:25, 6:4, 6:14, 7:17, 8:13, 10:4, 11:6, 11:25, 14:6, 14:8, 14:10, 17:9, 24:11, 25:20, 28:5, 32:16, 39:10, 42:4, 44:2, 44:10, 44:22, 45:16, 47:19, 54:5, 55:9 pointed [5] - 6:20, 11:14, 18:11, 18:22, 31:12 pointing [2] - 28:7, 51:22 points [4] - 6:12, 12:10, 12:23, 51:7 policy [7] - 20:7, 30:21, 31:1, 33:12, 34:20, 34:24, 51:4 portion [2] - 29:25, 30:6 portions [1] - 60:18 posed [1] - 56:3 position [4] - 15:18, 21:7, 38:17, 49:8 possible [2] - 59:7, 59:9 power [2] - 27:3, 27:4 practice [2] - 7:11, 7:12 practitioner [1] - 27:5 precede [1] - 37:2 predominant [6] - 6:17, 15:3, 29:18, 29:24, 33:25, 34:2 prefer [1] - 26:23 prejudice [1] - 58:17 preparation [15] - 7:13, 7:22, 8:25, 25:6, 25:7, 25:9, 39:15, 40:5, 40:8, 40:15, 40:19, 41:15, 47:10, 53:19 prepare [2] - 7:23, 53:17 prepared [7] - 6:11, 8:1, 8:7, 14:21, 37:11, 37:12, 53:3 preparing [7] - 7:16, 8:17, 25:16, 41:5, 53:11, 53:21, 53:22 present [1] - 50:4 preserve [1] - 58:23 presume [3] - 28:17, 32:2, 58:22 previously [2] - 32:7, 55:11 Princeton [1] - 2:12 priority [37] - 5:22, 6:15, 7:23, 9:1, 12:9, 12:15, 12:18, 12:21, 12:22, 12:25, 13:8, 14:22, 16:10, 16:13, 25:16, 28:9, 28:12, 28:19, 31:7, 31:8, 36:9, 37:3, 41:11, 41:13, 41:15, 44:3, 44:5, 44:9, 44:10, 44:11, 46:11, 46:25, 47:12, 51:11, 51:19 priv [1] - 54:19 privilege [49] - 9:7, 9:8, 9:9, 9:13, 9:15, 10:1, 10:10, 13:8, 18:20, 19:16, 19:18, 20:7, 20:9, 20:10, 20:12, 22:8, 23:9, 27:21, 27:25, 30:12, 30:16, 30:18, 32:7, 33:4, 33:6, 33:7, 33:8, 33:9,</p>	<p>33:10, 33:11, 33:14, 33:17, 34:22, 34:23, 36:20, 37:2, 39:17, 40:12, 47:22, 48:2, 48:4, 48:5, 49:18, 50:19, 50:22, 51:2, 53:6, 56:5 privileged [6] - 9:21, 27:21, 37:6, 48:6, 50:2, 56:17 problem [3] - 12:23, 48:16, 48:17 procedure [1] - 26:7 Procedure [2] - 48:9, 49:5 proceed [1] - 5:10 proceedings [2] - 6:25, 60:22 process [1] - 54:11 produce [4] - 34:9, 34:13, 34:16, 48:24 produced [10] - 29:20, 34:9, 34:10, 48:11, 50:12, 56:16, 57:12, 58:10, 58:12, 59:9 producing [6] - 29:20, 29:23, 30:7, 30:14, 30:17, 58:13 product [10] - 6:22, 7:11, 15:6, 15:7, 23:24, 24:1, 24:3, 24:4, 38:23, 39:11 production [6] - 10:7, 18:25, 19:22, 19:24, 57:8, 57:13 products [1] - 7:8 prong [2] - 27:12, 56:12 proof [3] - 6:2, 17:17, 17:22 proper [5] - 11:24, 22:1, 22:5, 23:13, 41:4 properly [2] - 36:7, 36:8 proposition [1] - 12:7 prosecute [2] - 27:6, 43:2 prosecution [26] - 7:19, 7:21, 8:13, 24:6, 24:16, 25:6, 26:17, 27:5, 28:1, 31:6, 31:10, 31:15, 31:16, 38:25, 39:14, 39:22, 40:4, 40:9, 40:16, 40:17, 40:24, 41:16, 47:10, 53:12, 53:13, 53:18 protect [3] - 18:16, 31:2, 50:1 protected [5] - 9:10, 20:17, 33:18, 50:7, 50:22 protecting [16] - 6:8, 6:9, 9:15, 9:16, 9:21, 9:25, 10:2, 19:15, 19:18, 19:21, 20:7, 20:22, 30:22, 34:19, 35:1, 49:21 protection [2] - 20:11, 46:13 protective [11] - 18:16, 32:5, 32:9, 47:24, 48:13, 48:16, 48:18, 48:20, 48:24, 49:2, 50:1 protects [3] - 30:19, 30:20, 47:22 prove [3] - 17:19, 23:2, 23:15 provide [2] - 13:2, 19:1 provided [4] - 7:12, 7:13, 36:19, 36:20 providing [1] - 54:19 proving [1] - 6:2 Public [1] - 61:11 purposes [3] - 26:22, 26:24, 45:11 pursuant [3] - 14:3, 17:18, 46:11 pursued [3] - 27:23, 28:1, 28:2 pursuing [1] - 27:23 put [8] - 28:22, 47:22, 48:7, 54:17, 57:7, 57:13, 58:17, 59:15 putting [3] - 15:17, 52:3, 57:18</p>	<p style="text-align: center;">Q</p> <p>questions [3] - 13:13, 31:20, 54:2 quick [2] - 51:7, 53:10 quickly [1] - 21:5 quite [1] - 36:25 quote [3] - 24:16, 30:15, 46:19 quoted [1] - 46:2 quoting [1] - 15:10</p> <p style="text-align: center;">R</p> <p>RAFTERY [1] - 2:18 raise [2] - 10:8, 10:25 RAKOCZY [1] - 3:6 Rakoczy [1] - 5:6 rather [1] - 12:3 read [9] - 9:9, 15:25, 32:2, 36:10, 36:11, 43:16, 43:19, 43:22, 47:7 reading [3] - 10:17, 37:22, 38:14 ready [2] - 5:10, 13:12 real [6] - 20:15, 43:25, 45:17, 45:18, 52:5, 54:21 really [4] - 45:15, 51:7, 52:4, 53:10 reason [10] - 18:15, 18:25, 19:2, 19:3, 20:1, 21:10, 28:9, 45:13, 48:11, 48:22 reasons [6] - 6:18, 21:9, 26:23, 34:6, 41:14, 43:24 rebuttal [1] - 35:6 received [2] - 35:25, 36:16 receiving [10] - 14:3, 16:24, 17:1, 17:3, 26:14, 35:23, 43:1, 43:3, 43:8 recent [2] - 55:23, 55:24 recently [1] - 60:9 recited [1] - 18:24 recognize [1] - 49:20 recognized [2] - 9:17, 18:21 reconsider [4] - 57:19, 58:3, 58:10 reconsideration [20] - 4:4, 5:18, 11:16, 11:25, 21:13, 21:14, 21:16, 21:23, 22:2, 22:5, 35:24, 36:3, 36:17, 57:11, 58:5, 58:9, 58:11, 58:12, 58:20, 59:8 record [7] - 4:5, 28:20, 29:5, 29:8, 58:21, 58:22, 60:10 redacted [1] - 60:15 redacting [1] - 60:18 Reddy's [1] - 13:4 reducing [1] - 7:11 reduction [1] - 7:11 REENS [1] - 2:14 Reens [1] - 4:19 refer [1] - 19:16 referencing [1] - 28:21 referred [1] - 20:6 referring [2] - 19:21, 29:6 refresher [1] - 30:10 regarding [1] - 6:7 regardless [4] - 20:19, 22:3, 48:17,</p>
---	---	---

<p>49:15 regularly [1] - 16:3 regulations [2] - 54:18, 54:21 reiterate [1] - 47:5 relate [19] - 7:15, 10:13, 12:22, 13:25, 20:21, 22:10, 23:1, 24:6, 28:2, 31:16, 36:24, 37:1, 38:12, 38:24, 39:14, 39:15, 40:14, 40:19, 40:25 related [18] - 16:9, 16:16, 16:19, 23:10, 27:21, 28:1, 28:8, 28:18, 30:1, 30:7, 31:10, 31:14, 31:17, 36:9, 37:13, 37:14, 51:18, 51:22 relating [3] - 10:12, 24:4, 30:14 relationship [3] - 22:19, 45:16, 46:4 relevance [2] - 14:11, 14:13 relevant [14] - 21:23, 24:5, 33:6, 37:19, 37:21, 40:22, 40:24, 41:12, 41:13, 48:1, 48:24, 51:10, 51:20 relied [1] - 11:4 rely [1] - 22:14 relying [2] - 12:23, 32:11 remember [1] - 53:1 remind [1] - 55:22 render [1] - 52:24 reply [4] - 20:6, 21:17, 21:18, 50:15 Reporter [3] - 61:10, 61:11, 61:15 REPORTER [1] - 1:25 representations [1] - 22:17 request [3] - 5:18, 48:10, 56:23 requested [1] - 56:17 require [3] - 15:6, 18:25, 57:12 required [1] - 50:10 requirement [2] - 7:4, 15:7 requirements [3] - 8:2, 17:16, 41:3 requiring [1] - 48:16 research [2] - 24:4, 25:2 researchers [1] - 7:7 reserve [1] - 55:6 respect [11] - 6:14, 10:4, 12:11, 21:7, 23:3, 25:3, 35:8, 39:20, 39:21, 55:19, 59:3 respectfully [8] - 5:18, 5:20, 5:25, 9:4, 17:20, 18:5, 19:14, 41:18 response [3] - 36:17, 53:15, 59:14 restatement [3] - 6:5, 19:13, 33:1 restrictive [1] - 60:12 result [1] - 19:7 returned [1] - 56:15 reverse [1] - 9:14 review [3] - 37:8, 37:10, 55:5 reviewed [2] - 5:15, 38:2 rise [2] - 4:1, 23:24 RMB/AMD [3] - 1:5, 1:10, 1:16 ROBERT [1] - 2:21 Robert [1] - 4:25 Rodriguez [1] - 11:2 role [1] - 39:5 Ropes [3] - 4:10, 4:11, 4:12 ROPES [1] - 2:6</p>	<p>Route [1] - 2:22 rule [2] - 21:16, 56:24 Rule [5] - 17:18, 17:23, 48:10, 48:13, 49:8 rules [10] - 21:16, 29:19, 30:14, 32:10, 33:24, 34:2, 34:3, 47:25, 54:21, 57:4 Rules [2] - 48:9, 49:5 ruling [7] - 55:15, 55:18, 56:14, 59:2, 60:1 run [1] - 34:12</p> <p style="text-align: center;">S</p> <p>sacred [1] - 18:20 sacredness [2] - 49:22, 50:19 safe [1] - 60:20 SAIBER [1] - 3:2 Saiber [1] - 5:5 SALMEN [4] - 3:6, 5:8, 59:24, 60:7 Salmen [1] - 5:6 Sande [3] - 18:11, 19:24, 49:16 SANDOZ [3] - 1:16, 2:20, 2:23 Sandoz [3] - 4:23, 59:23, 60:8 SAVERIANO [2] - 2:11, 4:17 Saveriano [1] - 4:17 scenario [1] - 57:13 scenarios [2] - 57:5, 57:6 schedule [1] - 59:10 seal [6] - 60:2, 60:4, 60:11, 60:12, 60:14, 60:17 sealing [1] - 60:14 search [3] - 24:20, 24:21, 52:13 seated [1] - 4:2 second [5] - 5:25, 27:12, 32:23, 34:4, 57:24 secret [20] - 6:3, 13:13, 17:12, 18:15, 19:22, 19:25, 20:11, 31:21, 32:24, 33:18, 34:20, 34:25, 35:2, 47:21, 48:12, 48:14, 48:21, 48:22, 49:1, 49:9 secrets [7] - 6:10, 9:16, 17:19, 19:4, 19:21, 19:23, 20:4 Section [7] - 15:9, 15:25, 16:5, 28:15, 43:7, 45:14, 46:15 section [1] - 28:9 sections [1] - 51:21 see [13] - 20:13, 22:13, 22:20, 25:1, 36:12, 43:20, 45:13, 47:8, 48:7, 54:19, 57:22, 60:15 seek [1] - 48:24 seeking [2] - 8:8, 46:13 seem [2] - 24:7, 24:9 semantics [1] - 53:12 send [1] - 53:14 Sensient [1] - 11:1 sent [1] - 10:8 separate [4] - 26:13, 26:25, 28:3, 37:14 separately [1] - 42:22 separating [1] - 48:4 serious [2] - 17:18, 19:7</p>	<p>set [2] - 36:2, 61:13 several [2] - 9:17, 47:8 shall [1] - 16:1 shaped [1] - 54:20 SHEILA [1] - 2:18 Sheila [1] - 4:24 shielding [1] - 33:12 Shorthand [1] - 61:11 shortly [2] - 55:7, 60:1 show [4] - 18:25, 19:3, 22:7, 23:4 showed [1] - 10:10 showing [8] - 17:18, 32:1, 32:10, 32:16, 32:17, 32:21, 47:18, 58:3 shows [3] - 49:25, 51:8, 51:10 shuffle [1] - 36:15 side [2] - 45:24, 45:25 significant [3] - 19:7, 27:4, 60:18 significantly [1] - 56:11 silly [1] - 31:18 similar [2] - 22:11, 26:24 similarly [1] - 10:6 site [2] - 54:9, 54:10 situation [6] - 8:19, 8:20, 10:4, 10:18, 10:22, 36:14 situations [1] - 11:21 Siwik [1] - 5:7 SIWIK [1] - 3:6 six [5] - 11:13, 12:6, 13:10, 31:5, 47:4 SKB [1] - 13:1 skipping [1] - 44:15 slower [1] - 51:13 small [1] - 54:5 sold [1] - 7:5 somewhat [1] - 34:17 soon [2] - 27:23, 27:25 sorry [9] - 12:13, 25:7, 30:5, 30:20, 35:12, 44:16, 51:15, 58:4, 58:14 sort [1] - 53:20 sorts [1] - 41:14 Southern [4] - 23:4, 23:5, 23:6, 23:7 specific [11] - 6:19, 13:15, 14:23, 15:17, 20:9, 23:23, 30:20, 30:21, 32:14, 33:11, 48:8 specifically [5] - 13:7, 30:19, 34:20, 47:11, 47:12 specifics [1] - 22:20 splitting [1] - 53:19 sprung [1] - 15:6 St [1] - 4:19 ST [1] - 2:14 stage [5] - 26:15, 26:21, 26:25, 27:7, 27:8 Stamford [1] - 2:15 stand [1] - 47:7 standard [14] - 11:16, 17:21, 17:23, 18:1, 18:2, 18:3, 18:5, 26:7, 32:1, 32:10, 32:12, 48:18, 49:15, 56:1 start [1] - 26:17 starting [1] - 4:16</p>
--	---	--

<p>State ^[1] - 61:11 state ^[2] - 47:11, 47:12 statement ^[3] - 13:20, 15:8, 16:21 STATES ^[3] - 1:1, 1:19, 1:23 states ^[1] - 18:7 States ^[58] - 5:23, 6:6, 6:8, 6:16, 6:17, 6:23, 7:4, 7:6, 7:7, 7:25, 8:3, 8:10, 9:7, 9:11, 10:16, 11:1, 12:9, 13:1, 13:10, 14:12, 14:23, 15:2, 15:3, 15:20, 16:1, 16:4, 16:24, 17:14, 19:15, 20:15, 20:20, 36:8, 38:13, 41:1, 41:8, 41:20, 42:19, 42:23, 43:4, 43:18, 43:19, 45:9, 46:4, 46:6, 46:14, 46:18, 46:21, 46:23, 46:24, 47:1, 50:4, 50:10, 52:6, 54:7, 54:8, 54:15, 54:22, 61:11 States' ^[1] - 46:20 status ^[1] - 55:9 statute ^[4] - 28:16, 34:7, 34:8, 43:17 statutes ^[1] - 34:15 stay ^[19] - 55:11, 55:14, 55:19, 56:2, 56:4, 56:13, 56:19, 56:23, 57:9, 57:15, 57:21, 58:16, 58:18, 58:23, 59:1, 59:6, 59:10, 59:13 Steinmetz ^[1] - 4:12 stenographic ^[1] - 61:12 sterile ^[4] - 7:5, 7:8, 15:6, 15:7 Steward ^[1] - 4:19 STEWARD ^[1] - 2:14 still ^[5] - 23:2, 32:19, 36:1, 51:7, 57:11 strategic ^[1] - 26:22 Street ^[4] - 2:4, 2:15, 2:18, 3:7 STREETS ^[1] - 1:20 strictly ^[1] - 7:20 strong ^[6] - 6:7, 20:3, 34:5, 34:18, 35:1, 42:22 strongly ^[1] - 39:1 subject ^[3] - 18:12, 30:23, 51:5 submission ^[8] - 21:11, 23:12, 23:17, 36:6, 38:4, 38:5, 38:6, 38:8 submissions ^[5] - 5:16, 11:23, 18:9, 18:10, 28:22 submit ^[23] - 5:20, 6:16, 8:19, 9:4, 11:23, 13:6, 17:20, 18:2, 18:5, 19:3, 19:14, 20:5, 20:8, 20:18, 27:1, 37:22, 49:14, 53:14, 53:16, 53:18, 53:21 submitted ^[8] - 21:18, 22:7, 22:8, 24:23, 24:24, 28:25, 35:8, 45:8 submitting ^[2] - 21:20, 38:1 subsequently ^[1] - 56:8 substantial ^[1] - 5:24 substantive ^[1] - 23:18 substantively ^[1] - 22:6 substituted ^[2] - 17:21, 50:6 substitutes ^[1] - 48:19 sufficient ^[2] - 18:16, 50:1 suggest ^[2] - 31:19, 42:7 suggests ^[2] - 14:2, 23:14 suit ^[1] - 46:11 Suite ^[3] - 2:18, 2:22, 3:7</p>	<p>summer ^[1] - 4:11 Supp ^[1] - 11:1 supplied ^[1] - 38:15 supported ^[1] - 10:24 supportive ^[1] - 10:6 supports ^[3] - 10:16, 37:22, 49:7 supposed ^[1] - 32:21 supposedly ^[2] - 21:25, 24:6 Supreme ^[1] - 49:23 sur ^[1] - 50:15 sur-reply ^[1] - 50:15 Sweden ^[25] - 6:6, 7:7, 16:25, 17:2, 20:13, 20:14, 24:19, 25:4, 25:17, 30:18, 30:25, 33:11, 33:22, 34:5, 34:8, 34:18, 40:25, 43:5, 48:20, 52:9, 52:10, 53:21, 53:24 Sweden's ^[4] - 33:13, 33:14, 34:4, 34:7 Swedish ^[65] - 6:3, 6:9, 9:16, 10:12, 13:12, 14:21, 14:25, 16:14, 16:18, 16:20, 17:8, 17:12, 17:15, 17:16, 17:22, 17:24, 18:11, 19:1, 19:20, 19:22, 20:2, 20:6, 20:7, 24:10, 24:19, 24:22, 25:2, 25:16, 25:24, 26:14, 27:10, 31:21, 32:23, 32:24, 33:9, 33:10, 33:11, 34:13, 39:9, 39:20, 40:4, 40:6, 40:17, 40:18, 41:2, 41:3, 41:5, 41:8, 43:1, 44:7, 45:18, 47:17, 47:21, 48:19, 48:22, 50:6, 51:1, 52:10, 52:12, 53:24, 54:6</p> <p style="text-align: center;">T</p> <p>talks ^[4] - 7:19, 43:20, 49:17 teased ^[1] - 42:21 technical ^[2] - 18:15, 49:1 telephone ^[1] - 55:20 ten ^[1] - 57:14 tenuous ^[1] - 53:7 terms ^[6] - 12:6, 17:12, 28:14, 38:22, 47:17, 59:6 test ^[1] - 6:5 THE ^[112] - 1:1, 4:2, 4:13, 4:15, 4:20, 4:22, 5:2, 5:9, 5:12, 5:15, 6:13, 6:24, 7:2, 10:19, 11:7, 11:10, 11:15, 12:5, 13:15, 13:19, 14:1, 14:7, 15:8, 15:13, 16:22, 17:4, 17:6, 17:9, 19:10, 19:12, 20:23, 20:25, 21:3, 21:7, 23:19, 25:25, 26:5, 26:9, 27:7, 27:12, 27:15, 27:18, 28:20, 29:2, 29:5, 29:8, 30:2, 31:23, 33:16, 35:4, 35:6, 35:10, 35:13, 35:16, 35:21, 36:20, 37:8, 37:19, 37:24, 38:7, 38:17, 39:25, 40:2, 40:7, 40:10, 40:17, 40:21, 40:23, 41:19, 42:1, 42:7, 43:11, 43:14, 44:14, 44:17, 44:23, 45:1, 45:4, 45:6, 45:17, 47:3, 47:19, 47:21, 48:7, 48:21, 49:4, 49:7, 49:13, 50:13, 50:15, 51:13, 52:2, 53:8, 54:3, 54:24, 55:2, 55:4, 55:16, 55:22, 55:25, 56:22, 57:5, 58:2, 58:6, 58:8, 58:16, 59:1, 59:11,</p>	<p>59:18, 59:22, 59:25, 60:9 themselves ^[2] - 27:6, 39:5 therefore ^[3] - 11:24, 41:14, 42:24 they've ^[3] - 21:18, 22:7, 24:10 thinking ^[3] - 25:15, 25:18, 25:19 third ^[5] - 6:4, 22:6, 44:14, 44:17, 57:18 three ^[5] - 5:19, 6:12, 52:8, 57:6, 57:23 tight ^[1] - 30:14 timing ^[3] - 14:10, 15:18, 59:6 today ^[10] - 4:9, 32:20, 55:8, 55:12, 55:13, 56:20, 58:21, 59:15, 59:19, 60:10 together ^[1] - 42:21 took ^[3] - 25:3, 25:4, 52:10 topics ^[1] - 23:18 total ^[1] - 20:6 totally ^[1] - 44:4 touch ^[9] - 5:22, 6:16, 17:14, 20:20, 36:8, 38:13, 40:25, 46:6, 50:3 touched ^[8] - 10:15, 12:25, 13:9, 20:16, 46:17, 46:21, 46:22, 46:25 touches ^[1] - 39:2 touching ^[5] - 12:9, 13:2, 13:4, 13:13, 38:22 tough ^[1] - 34:6 towards ^[1] - 22:9 Trade ^[7] - 8:12, 9:23, 12:16, 18:22, 47:5, 47:9, 49:19 trade ^[28] - 6:3, 6:9, 9:16, 13:12, 17:12, 17:19, 18:15, 19:4, 19:21, 19:22, 19:23, 19:25, 20:4, 20:10, 31:21, 32:24, 33:18, 34:20, 34:25, 35:2, 47:21, 48:12, 48:14, 48:21, 48:22, 49:1, 49:9 Trademark ^[2] - 16:4, 46:14 transcription ^[1] - 61:12 travel ^[1] - 60:20 Treaty ^[1] - 46:12 treaty ^[1] - 14:1 tremendous ^[1] - 41:14 tried ^[1] - 22:14 trouble ^[1] - 52:25 true ^[5] - 8:6, 9:14, 41:22, 50:20, 61:12 try ^[2] - 35:16, 36:18 trying ^[1] - 33:15 turned ^[2] - 17:14, 56:13 two ^[14] - 10:9, 16:12, 23:5, 23:22, 26:18, 33:3, 34:6, 45:22, 50:22, 51:21, 52:9, 52:11, 57:5 type ^[2] - 34:19, 52:17 types ^[3] - 18:1, 32:15, 34:21 typically ^[2] - 18:1, 32:15</p> <p style="text-align: center;">U</p> <p>U.S. ^[129] - 5:22, 5:23, 6:15, 7:4, 7:9, 8:1, 8:2, 8:6, 8:9, 8:20, 8:22, 8:24, 9:2, 9:6, 9:12, 9:15, 9:20, 9:22, 10:1, 10:13, 10:14, 13:16, 13:25, 14:4, 14:9, 14:12,</p>
--	---	--

<p>14:15, 14:18, 14:19, 15:1, 15:4, 15:6, 15:10, 15:15, 15:21, 16:6, 16:7, 16:9, 16:16, 16:19, 19:18, 20:16, 20:22, 22:19, 23:10, 24:2, 25:11, 25:18, 25:21, 25:22, 26:1, 26:16, 26:17, 27:5, 28:1, 28:8, 28:11, 28:16, 28:18, 28:25, 29:12, 29:19, 29:23, 30:24, 31:8, 33:4, 34:1, 34:2, 36:9, 36:10, 36:24, 37:1, 38:13, 39:7, 39:9, 41:10, 41:11, 42:2, 42:7, 42:17, 42:20, 42:22, 43:6, 43:7, 43:8, 43:14, 44:7, 44:8, 44:9, 44:10, 44:13, 44:18, 44:22, 44:24, 45:11, 46:7, 46:10, 46:25, 47:12, 47:24, 48:8, 49:2, 49:20, 50:6, 50:7, 50:25, 51:22, 51:24, 51:25, 52:3, 52:9, 52:14, 52:15, 52:21, 54:18, 54:21, 61:15</p> <p>U.S.'s [1] - 33:23</p> <p>U.S.C [2] - 15:25, 46:15</p> <p>UK [3] - 8:23, 9:8</p> <p>ultimately [2] - 52:15, 53:2</p> <p>unable [2] - 10:22, 36:13</p> <p>unauthorized [1] - 21:18</p> <p>under [34] - 6:3, 8:16, 9:20, 12:19, 14:23, 15:9, 15:22, 15:24, 16:2, 17:23, 17:24, 18:25, 19:13, 20:2, 26:9, 26:10, 32:10, 33:18, 34:8, 34:19, 34:25, 35:2, 41:1, 41:5, 43:6, 46:13, 48:13, 49:2, 50:7, 53:5, 60:11, 60:12, 60:17</p> <p>understood [2] - 27:24, 27:25</p> <p>undue [3] - 30:23, 31:2, 51:6</p> <p>United [59] - 5:23, 6:6, 6:7, 6:16, 6:17, 6:22, 7:4, 7:5, 7:7, 7:25, 8:3, 8:10, 9:7, 9:11, 10:16, 11:1, 12:9, 13:1, 13:9, 14:11, 14:23, 15:2, 15:3, 15:20, 16:1, 16:4, 16:24, 17:14, 19:15, 20:15, 20:20, 36:8, 38:13, 41:1, 41:8, 41:20, 42:19, 42:23, 43:4, 43:18, 45:9, 46:4, 46:6, 46:13, 46:18, 46:20, 46:21, 46:23, 46:24, 47:1, 50:3, 50:10, 52:5, 54:7, 54:8, 54:15, 54:22, 61:11</p> <p>UNITED [3] - 1:1, 1:19, 1:23</p> <p>unless [5] - 13:13, 23:17, 27:6, 31:20, 54:1</p> <p>unquote [2] - 24:16, 30:15</p> <p>unreasonable [2] - 50:24, 51:1</p> <p>unusual [2] - 29:21, 29:22</p> <p>up [7] - 7:7, 30:3, 37:11, 38:19, 56:8, 59:11, 60:17</p> <p>usable [1] - 56:15</p> <p>useful [1] - 35:20</p>	<p>versus [3] - 6:6, 44:5, 53:11</p> <p>view [3] - 48:15, 55:9, 55:13</p> <p>VLT [4] - 8:12, 10:2, 18:23, 49:19</p> <p>voice [1] - 30:3</p> <p>vs [4] - 1:4, 1:10, 1:15, 11:1</p>
W	
	<p>Wahlstrom [2] - 42:25, 49:17</p> <p>waived [2] - 56:5, 56:8</p> <p>waiver [1] - 56:10</p> <p>walk [1] - 38:10</p> <p>Wallack [1] - 4:18</p> <p>WALLACK [1] - 2:10</p> <p>Waltham [1] - 54:9</p> <p>wants [1] - 24:25</p> <p>warranted [1] - 60:17</p> <p>water [1] - 7:1</p> <p>ways [3] - 11:22, 11:23, 26:19</p> <p>week [2] - 10:8, 35:9</p> <p>weighs [1] - 6:5</p> <p>welcome [1] - 4:13</p> <p>West [1] - 3:7</p> <p>whatsoever [1] - 12:21</p> <p>whole [5] - 30:8, 40:2, 42:3, 43:1, 60:11</p> <p>Wiggins [1] - 4:24</p> <p>WIGGINS [2] - 2:18, 4:24</p> <p>wish [1] - 17:9</p> <p>withheld [9] - 7:13, 7:14, 12:14, 12:19, 36:7, 40:3, 40:11, 40:14, 47:13</p> <p>withhold [4] - 32:6, 39:24, 40:1, 47:25</p> <p>Woodbridge [1] - 2:22</p> <p>word [1] - 43:12</p> <p>works [1] - 30:25</p> <p>world [7] - 42:24, 43:25, 45:17, 45:18, 52:5, 54:21, 58:1</p> <p>worried [1] - 56:20</p>
X	
	XIO1492 [1] - 61:16
Y	
	<p>York [5] - 2:8, 22:15, 23:4, 23:5</p> <p>York's [2] - 23:6, 23:7</p> <p>Yun [1] - 4:9</p>
V	
<p>vacuum [3] - 20:12, 30:15, 42:14</p> <p>vague [2] - 22:9, 22:12</p> <p>valid [1] - 8:2</p> <p>valuable [1] - 29:13</p> <p>various [2] - 21:9, 56:2</p> <p>versions [1] - 60:15</p>	